United Nations

Report of the International Law Commission on the work of its forty-eighth session

6 May-26 July 1996

General Assembly
Official Records • Fifty-first Session
Supplement No. 10 (A/51/10)

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CHAPTER I

INTRODUCTION

1. The International Law Commission established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-eighth session at its seat at the United Nations Office at Geneva, from 6 May to 26 July 1996.

A. Membership

2. The Commission consists of the following members:

Mr. Husain Al-Baharna (Bahrain)
Mr. Awn Al-Khasawneh (Jordan)
Mr. Gaetano Arangio-Ruiz (Italy)
Mr. Julio Barboza (Argentina)
Mr. Mohamed Bennouna (Morocco)
Mr. Derek William Bowett (United Kingdom)
Mr. Carlos Calero Rodrigues (Brazil)
Mr. James Crawford (Australia)
Mr. John de Saram (Sri Lanka)
Mr. Gudmundur Eiriksson (Iceland)
Mr. Nabil Elaraby (Egypt)
Mr. Salifou Fomba (Mali)
Mr. Mehmet Güney (Turkey)
Mr. Qizhi He (China)
Mr. Kamil Idris (Sudan)
Mr. Andreas Jacovides (Cyprus)
Mr. Peter Kabatsi (Uganda)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Igor Ivanovich Lukashuk (Russian Federation)
Mr. Ahmed Mahiou (Algeria)
Mr. Vaclav Mikulka (Czech Republic)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Edilbert Razafindralambo (Madagascar)
Mr. Patrick Lipton Robinson (Jamaica)
Mr. Robert Rosenstock (United States)
Mr. Alberto Szekely (Mexico)

Mr. Doudou Thiam (Senegal)
Mr. Christian Tomuschat (Germany)
Mr. Edmundo Vargas Carreño (Chile)
Mr. Francisco Villagran Kramer (Guatemala)
Mr. Chusei Yamada (Japan)
Mr. Alexander Yankov (Bulgaria)

B. Officers and the Enlarged Bureau

3. At its 2426th meeting, on 6 May 1996, the Commission elected the following officers:

Chairman: Mr. Ahmed Mahiou
First Vice-Chairman: Mr. Robert Rosenstock
Second Vice-Chairman: Mr. Mochtar Kusuma-Atmadja
Chairman of the Drafting Committee: Mr. Carlos Calero Rodrigues
Rapporteur: Mr. Igor Ivanovich Lukashuk

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, previous Chairmen of the Commission 1/ and the Special Rapporteurs. 2/

5. On the recommendation of the Enlarged Bureau, the Commission, at its 2427th meeting, on 7 May 1996, set up a Planning Group composed of the following members: Mr. Robert Rosenstock (Chairman), Mr. Derek William Bowett, Mr. Carlos Calero Rodrigues, Mr. James Crawford, Mr. Mehmet Güney, Mr. Kamil Idris, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou, Mr. Vaclav Mikulka, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao, Mr. John de Saram, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Chusei Yamada.

C. Drafting Committee

6. At its 2427th meeting, on 7 May 1996, the Commission established a Drafting Committee composed of the following members for the topics indicated: Draft Code of Crimes against the Peace and Security of Mankind: Mr. Carlos Calero Rodrigues (Chairman), Mr. Doudou Thiam (Special Rapporteur), Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Qizhi He, Mr. Mochtar Kusuma-Atmadja, Mr. Vaclav Mikulka, Mr. Robert Rosenstock,

---

1/ Namely, Mr. Julio Barboza, Mr. Doudou Thiam, Mr. Christian Tomuschat, Mr. Alexander Yankov and Mr. Rao.

2/ Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Vaclav Mikulka, Mr. Alain Pellet and Mr. Doudou Thiam.

Mr. John de Saram, Mr. Alberto Szekely, Mr. Christian Tomuschat, Mr. Chusei Yamada, Mr. Alexander Yankov, and Mr. Igor Ivanovich Lukashuk (Ex-officio member).

State Responsibility:

Mr. Carlos Calero Rodrigues (Chairman), Mr. Mohamed Bennouna, Mr. Derek William Bowett, Mr. James Crawford, Mr. Gudmundur Eiriksson, Mr. Qizhi He, Mr. Peter Kabatsi, Mr. Vaclav Mikulka, Mr. Alain Pellet, Mr. Robert Rosenstock, Mr. John de Saram, Mr. Alberto Szekely, Mr. Christian Tomuschat, Mr. Francisco Villagran Kramer, Mr. Chusei Yamada and Mr. Igor Ivanovich Lukashuk (Ex-officio member).

7. The Drafting Committee held a total of 34 meetings on the above topics.

D. Working Groups

8. At its 2435th meeting, on 4 June, the Commission established a Working Group on State succession and its impact on the nationality of natural and legal persons which was composed of: Mr. Vaclav Mikulka (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Derek William Bowett, Mr. James Crawford, Mr. Salifou Fomba, Mr. Kamil Idris, Mr. Igor Lukashuk, Mr. Robert Rosenstock, Mr. Albert Szekely, Mr. Christian Tomuschat, Mr. Edmundo Vargas-Carreño, Mr. Chusei Yamada.

9. At its 2450th meeting, on 28 June, the Commission established a Working Group on International liability for injurious consequences arising out of acts not prohibited by international law, which was composed of: Mr. Julio Barboza (Chairman), Mr. Husain Al-Baharna, Mr. Mohamed Bennouna, Mr. James Crawford, Mr. Gudmundur Eiriksson, Mr. Salifou Fomba, Mr. Peter Kabatsi, Mr. Igor Ivanovich Lukashuk, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Alberto Szekely and Mr. Francisco Villagran Kramer.

10. The Working Group on the Long-term programme of work was re-established and was composed of: Mr. Derek William Bowett (Chairman), Mr. James Crawford, Mr. Qizhi He, Mr. Mochtar Kusuma-Atmadja, Mr. Igor Ivanovich Lukashuk, Mr. Alain Pellet, Mr. Robert Rosenstock and Mr. Chusei Yamada.

E. Secretariat

11. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Assistant Secretary to the Commission;

Ms. Christiane Bourloyannis-Vrailas, Mr. George Korontzis and Ms. Virginia Morris, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

12. At its 2426th meeting, on 6 May 1996, the Commission adopted an agenda for its forty-eighth session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Draft Code of crimes against the peace and security of mankind.
4. International liability for injurious consequences arising out of acts not prohibited by international law.
5. The law and practice relating to reservations to treaties.
6. State succession and its impact on the nationality of natural and legal persons.
7. Programme, procedures and working methods of the Commission and its documentation.
8. Cooperation with other bodies.
9. Date and place of the forty-ninth session.
10. Other business.

G. Summary of the work of the Commission at its forty-eighth session

13. The Commission considered all the items on its agenda. The first seven weeks were allocated mainly to the Drafting Committee for it to complete the second reading of the articles on the draft Code on crimes against the peace and security of mankind, and the first reading of draft articles on State responsibility.

14. The Commission adopted a set of 20 articles constituting the draft Code of crimes against the peace and security of mankind and commentaries thereto (Chapter II below). The Commission after having considered various forms which the draft Code could take, it recommended that the General Assembly select the most appropriate form which would ensure the widest possible acceptance of the draft Code. The Commission also requested the Secretary-General to bring the draft articles to the attention of the Preparatory Committee on the Establishment of an International Criminal Court established in accordance with General Assembly resolution 50/46 of 11 December 1995.

15. The Commission completed on first reading a set of 60 draft articles (with annexes) on State responsibility (Chapter III below). The Commission

decided to transmit the draft articles to Governments for comments to be submitted to the Secretary-General by 1 January 1998.

16. Regarding the topic of State succession and its impact on the nationality of natural and legal persons, the Commission set out its recommendations to the General Assembly regarding the Commission's plan and approach to be followed on that topic in its future sessions (Chapter IV below).

17. Concerning the topic of International liability for injurious consequences arising out of acts not prohibited by international law, the Commission decided to transmit the report of the Working Group on the subject (consisting of 22 draft articles and commentaries thereto) to the General Assembly for comments (Chapter V below).

18. With respect to the topic of the Law and practice relating to reservations to treaties, the Commission decided to examine the second report of the Special Rapporteur at its next session (Chapter VI below).

19. With respect to its programme, procedure and working methods and in response to issues raised in paragraph 9 of General Assembly resolution 50/45 of 11 December 1995, the Commission adopted specific conclusions and recommendations which are contained in Chapter VII, Section A, subsection 1 below.

20. With respect to the long-term programme of work, the Commission, inter alia, set out a general outline of the main legal problems raised by three of the possible future topics which in the view of the Commission are ready for codification and progressive development (Chapter VII, Section A, subsection 2 and Annex II below).

21. Other relevant decisions and conclusions are contained in Chapter VII, Sections B, C, D, E, F and G, dealing respectively with cooperation with other bodies, date and place of the forty-ninth session, representation at the fifty-first session of the General Assembly, contribution to the decade of international law, the International Law Seminar and the Gilberto Amado Memorial Lecture.

H. Specific issues on which comments would be of particular interest to the Commission

22. Paragraph 9 (b) of General Assembly resolution 50/45 requested the Commission to indicate in its report those specific issues for each topic on which expressions of views by Governments, either in the Sixth Committee or in

written form, would be of particular interest in providing effective guidance for the Commission in its future work. The following issues have been identified in response to that request.

(a) State responsibility

23. The Commission completed its first reading of the topic which consists of 60 articles divided into three parts. In accordance with its Statute, the Commission is requesting views on the entire set of draft articles. It would, however, particularly appreciate views on:

- (i) the proposed distinction between international delicts and international crimes as presently set out in draft article 19 of Part One, and the consequences resulting therefrom as set out in draft articles 51 to 53 and commentaries thereto;
- (ii) the issues relating to countermeasures as set out in draft articles 47 to 50 of Part Two, and commentaries thereto;
- (iii) the dispute settlement provisions contained in draft articles 54 to 60 of Part Three (and annexes I and II), and their application to the draft articles.

(b) State succession and its impact on the nationality of natural and legal persons

24. The Commission proposed to consider this topic in the following manner: first, it would address the question of State succession on the nationality of natural persons and then, on the basis of Governments' views, the question of the effect of State succession on the nationality of legal persons. The Commission would welcome comments on its plan and approach for this topic set out in paragraph 88 below.

(c) International liability for injurious consequences arising out of acts not prohibited by international law

25. In response to paragraph 3 of General Assembly resolution 50/45 requesting the Commission to resume work on the topic, a Working Group was established. It proposed 22 draft articles (and commentaries thereto) including general provisions and articles pertaining to prevention, and compensation or other relief. The General Assembly and Governments are invited (see paragraph 100) to comment on the question referred to in paragraph (26) of the commentary to article 1, the approach to the issue of compensation or other relief as set out in Chapter III, as well as on the draft articles as a whole. Without prejudice to the above and with a view to facilitating specific comments, the following questions have been formulated:

(i) as provided for in draft article 1 (a), the scope of the present draft articles would apply to "activities not prohibited by international law which involve a risk of causing significant transboundary harm". Should the scope be extended to cover "other activities not prohibited by international law which do not involve a risk of causing significant transboundary harm but none the less cause such harm"? (See article 1 (b) and paragraph (26) of the commentary to article 1, Annex I below.) Furthermore, should article 1 be supplemented by a list of activities or substances to which the articles apply or should it be confined, as it is now, to a general definition of activities?

(ii) the obligations of prevention provided for in Chapter II of the draft articles currently entail consequences essentially in relation to the extent of liability for compensation and other relief. Should the consequences be further extended to entail State responsibility for violating preventive measures? (See, in particular, paragraph (2) of the commentary to draft article 22.)

(iii) as provided for in draft article 5, liability for transboundary harm gives rise to "compensation or other relief". The formulations in chapter III dealing with compensation and other relief have been drafted in a flexible manner and do not impose "categorical obligations", (See paragraphs (1) and (3) of the commentary to draft articles 5, Annex I, below). Comments on this approach would therefore be very useful.

(iv) draft articles 20 to 22 set out two procedures through which injured parties might seek remedies: pursuing claims in the courts of the State of origin, or through negotiations between the State of origin and the affected State or States. Governments' views would therefore be appreciated particularly in respect to the adequacy of these procedures for the purpose of seeking remedies.

(d) Law and practice relating to reservations to treaties

26. Due to lack of time, the Commission did not consider the second report of the Special Rapporteur. Some of the main issues raised in the report were summarized in paragraphs 111 to 137, particularly in paragraphs 113 to 115 and 133 below. It is recalled that the Special Rapporteur has prepared a questionnaire which was duly transmitted to Governments by the Secretariat. So far 14 responses from Governments have been received.

27. The Commission would welcome comments by Governments that have not yet responded to the questionnaire referred to in the preceding paragraph.

(e) Programme, procedures and methods

28. With particular reference to paragraph 9 (a) of General Assembly resolution 50/45 of 11 December 1995, which requested the Commission to examine the procedures of its work and to include its views in its report to the General Assembly, a report on this subject is included in paragraphs 145 to 244 below. The conclusions and recommendations of the Commission are summarized in paragraphs 148 and 149 below.

29. As regards its future work, the Commission has identified three possible future topics for consideration: diplomatic protection; ownership and protection of wrecks beyond the limits of national maritime jurisdiction; and unilateral acts of States. For each topic, a general outline is also provided (see Annex II, Addenda 1 to 3). Governments are invited to express their views on this issue.

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

30. The General Assembly, in resolution 177 (II) of 21 November 1947, requested the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal; and (b) prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

31. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 3/

32. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee has submitted its report.

33. On the basis of the recommendations of the Special Committee, the General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.

34. The General Assembly, however, did not take action on the draft Code, until on 10 December 1981 it invited, in resolution 36/106, the Commission to resume its work with a view to elaborating the draft Code and to examine it

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3/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. 4/

35. The Commission, at its thirty-fourth session, in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. 5/ The Commission, from its thirty-fifth session, in 1983, to its forty-third session, in 1991, received nine reports from the Special Rapporteur. 6/

36. At its forty-third session, in 1991, the Commission, provisionally adopted on first reading the draft articles of the draft Code of Crimes against the Peace and Security of Mankind. 7/ At the same session, the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 January 1993. 8/ The Commission noted that the draft it had completed on first reading constituted the first part of the Commission's work on the topic of the draft Code; and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly had assigned to it in paragraph 3 of resolution 45/41, of 28 November 1990, which invited the Commission, in its

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4/ In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read "Draft Code of Crimes against the Peace and Security of Mankind". For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session, Yearbook ... 1983, vol. II, Part Two, pp. 10-13.

5/ See Yearbook ... 1982, vol. II, Part Two, p. 121.

6/ Yearbook ... 1983, vol. II (Part One), p. 137, document A/CN.4/364; Yearbook ... 1984, vol. II (Part One), p. 89, document A/CN.4/377; Yearbook ... 1985, vol. II (Part One), document A/CN.4/387; Yearbook ... 1986, vol. II, document A/CN.4/398; Yearbook ... 1987, vol. II (Part One), document A/CN.4/404; Yearbook ... 1988, vol. II (Part One), document A/CN.4/411; Yearbook ... 1989, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr.1 and 2 (Spanish only); Yearbook ... 1990, vol. II (Part One), document A/CN.4/430 and Add.1; Yearbook ... 1991, vol. II (Part One), document A/CN.4/435 and Add.1 and Corr.1.

7/ See Yearbook ... 1991, vol. II (Part Two), para. 173.

8/ Ibid., para. 174.

work on the draft Code, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. 9/

37. At its forty-sixth session, the General Assembly in its resolution 46/54 of 9 December 1991 invited the Commission, within the framework of the draft Code to consider further and analyse the issues raised in the Commission's report on the work of its forty-third session (1991) 10/ concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism, in order to enable the General Assembly to provide guidance on the matter.

38. At its forty-fourth and forty-fifth sessions, in 1992 and 1993, the Commission had before it the Special Rapporteur's tenth and eleventh reports on the topic, 11/ which were entirely devoted to the question of the possible establishment of an international criminal jurisdiction. The work carried out by the Commission at its forty-fourth (1992), forty-fifth (1993) and forty-sixth sessions on that question culminated in the adoption, at the forty-sixth session in 1994, of a draft statute of an international criminal court which the Commission submitted to the General Assembly with the recommendation that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court. 12/

39. At its forty-sixth session in 1994, the Commission had before it the Special Rapporteur's twelfth report on the topic, 13/ which was intended for the second reading of the draft Code and focused on the general part of the draft dealing with the definition of crimes against the peace and security

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9/ Ibid., para. 175. The Commission noted that it had already started to discharge this mandate and its work on this aspect of the topic was reflected in paras. 106 to 165 of its report (ibid.).

10/ Yearbook ... 1990, vol. II (Part Two) (A/45/10), chap. II, sect. C.

11/ A/CN.4/442 and A/CN.4/449 and Corr.1 (English only).

12/ See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. II A.

13/ A/CN.4/460 and Corr.1.

of mankind, characterization and general principles. It also had before it the comments and observations of Governments 14/ on the draft Code adopted on first reading at that session. 15/ After considering the twelfth report, the Commission decided at its 2350th meeting to refer draft articles 1 to 15, as dealt with in that report, to the Drafting Committee.

40. At its forty-seventh session, the Commission had before it the thirteenth report of the Special Rapporteur. 16/ This report was prepared for the second reading of the draft Code and focused on the crimes against the peace and security of mankind set out in Part II. After consideration of the thirteenth report, the Commission decided at its 2387th meeting to refer to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration as a matter of priority on second reading, in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in plenary. This was done on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and at its discretion deal with all or part of the elements of the following draft articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism). The Commission further decided that consultations would continue as regards articles 25 (Illicit traffic in narcotic drugs) and 26 (Wilful and severe damage to the environment).

41. As regards article 26 concerning wilful and severe damage to the environment, the Commission decided at its 2404th meeting to establish a working group that would meet at the beginning of the forty-eighth session to examine the possibility of covering in the draft Code the issue of wilful and severe damage to the environment, while reaffirming the Commission's intention to complete the second reading of the draft Code at that session in any event.

14/ In document A/CN.4/448 and Add.1.

15/ Yearbook ... 1991, vol. II (Part Two), chap. IV.

16/ A/CN.4/404 and Corr.1 (English and Russian only).

42. The Drafting Committee began its work on the second reading of the draft articles at the forty-seventh session of the Commission and completed its work at the present forty-eighth session.

43. At the forty-eighth session, the working group examining the issue of wilful and severe damage to the environment met and proposed to the Commission that the issue of wilful and severe damage to the environment be considered either as (i) a war crime, or (ii) a crime against humanity, or a separate crime against the peace and security of mankind.

44. The Commission at its 2431st meeting decided by a vote to refer to the Drafting Committee only the text prepared by the Working Group for inclusion of wilful and severe damage to the environment as a war crime.

45. The Commission considered the report of the Drafting Committee 17/ at its 2437th to 2454th meetings from 6 June to 5 July 1996 and adopted the final text of a set of 20 draft articles constituting the code of crimes against the peace and security of mankind.

46. The draft Code was adopted with the following understanding:

> "with a view to reaching consensus, the Commission has considerably reduced the scope of the Code. On first reading in 1991, the draft Code comprised a list of 12 categories of crimes. Some members have expressed their regrets at the reduced scope of coverage of the Code. The Commission acted in response to the interest of adoption of the Code and of obtaining support by Governments. It is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law."

B. Recommendation of the Commission

47. The Commission considered various forms which the draft Code of crimes against the peace and security of mankind could take; these include an international convention, whether adopted by a plenipotentiary conference or by the General Assembly; incorporation of the Code in the statute of an international criminal court; or adoption of the Code as a declaration by the General Assembly.

17/ A/CN.4/L.522 and Corr.1 (English only), 2 (French only) and 3 (Spanish only).

48. The Commission recommends that the General Assembly select the most appropriate form which would ensure the widest possible acceptance of the draft Code.

C. Tribute to the Special Rapporteur, Mr. Doudou Thiam

49. At its 2454th meeting on 5 July 1996, the Commission, after adopting the text of the articles of the draft Code against the Peace and Security of Mankind, adopted the following resolution by acclamation:

> "The International Law Commission,
>
> Having adopted the draft articles on the draft Code of Crimes against the Peace and Security of Mankind,
>
> Expresses to the Special Rapporteur, Mr. Doudou Thiam, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft Code through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on the draft Code of Crimes against the Peace and Security of Mankind."

D. Articles on the draft Code of crimes against the Peace and Security of Mankind

50. The text of, and commentaries to, draft articles 1 to 20 as finally adopted by the Commission at its forty-eighth session are reproduced below.

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

PART I. GENERAL PROVISIONS

Article 1

Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set out in Part II.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

Commentary

(1) As the first article in the draft Code of crimes against the Peace and Security of Mankind, article 1 addresses as a preliminary matter the scope and application of the provisions of the present Code.

(2) Paragraph 1 restricts the scope and application of the present Code to those crimes against the peace and security of mankind that are set out in Part II. This provision is not intended to suggest that the present Code

covers exhaustively all crimes against the peace and security of mankind, but rather to indicate that the scope and application of the Code are limited to those crimes dealt with in Part II.

(3) The phrase "crimes against the peace and security of mankind" should be understood in the present provision of the present Code as referring to the crimes listed in Part II. The Commission considered adding to the end of paragraph 1 the phrase "hereinafter referred to as crimes against the peace and security of mankind" so as to dispel any possible misunderstanding. It, however, felt that such an addition would make the paragraph unnecessarily cumbersome.

(4) The Commission decided not to propose a general definition of crimes against the peace and security of mankind. It took the view that it should be left to practice to define the exact contours of the concept of crimes against peace, war crimes and crimes against humanity, as identified in article 6 of the Charter of the Nürnberg Tribunal.

(5) Paragraph 2 addresses two fundamental principles relating to individual responsibility for the crimes against the peace and security of mankind under international law.

(6) The opening clause of paragraph 2 indicates that international law provides the basis for the criminal characterization of the types of behaviour which constitute crimes against the peace and security of mankind under Part II. Thus, the prohibition of such types of behaviour and their punishability are a direct consequence of international law.

(7) This provision is consistent with the Charter and the judgement of the Nürnberg Tribunal. 18/ Article 6 of the Nürnberg Charter authorized the Nürnberg Tribunal to try and punish individuals for three categories of crimes under international law, namely crimes against peace, war crimes and crimes against humanity. 19/ In its judgement the Nürnberg Tribunal recognized the existence of duties incumbent upon individuals by virtue of international law. "That international law imposes duties and liabilities upon individuals

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18/ The General Assembly unanimously affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgement of the Tribunal in resolution 95 (I) of 11 December 1946.

19/ Agreement for the prosecution and punishment of the major war criminals of the European Axis [hereinafter Nürnberg Charter], 82 U.N.T.S. 279.

as well as upon States has long been recognized." 20/ The Nürnberg Tribunal also recognized that individuals could incur criminal responsibility and be liable to punishment as a consequence of violating their obligations under international law. In this regard, the Nürnberg Tribunal expressly stated "that individuals can be punished for violations of international law." 21/

(8) The Commission recognized the general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law in Principle I of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal. 22/ Principle I provides that "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." As indicated in the commentary to this provision, "The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law." This principle was also articulated in the first article of the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954 [hereinafter 1954 draft Code]. 23/

(9) The concluding clause of paragraph 2 confirms that international law applies to crimes against the peace and security of mankind irrespective of the existence of any corresponding national law. The result is the autonomy of international law in the criminal characterization of the types of behaviour which constitute crimes against the peace and security of mankind under Part II.

(10) The said clause states that the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as

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20/ Nazi Conspiracy and Aggression: Opinion and Judgement [hereinafter Nürnberg Judgement] (U.S. Gov. Printing Office 1947), at p. 52.

21/ Ibid.

22/ Yearbook ... 1950, vol. II, p. 374 [hereinafter Nürnberg Principles].

23/ Article 1 stated that "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished." Yearbook ... 1954, vol. II, p. 150.

criminal under international law. It is conceivable that a particular type of behaviour characterized as a crime against the peace and security of mankind in Part II might not be prohibited or might even be imposed by national law. It is also conceivable that such behaviour might be characterized merely as a crime under national law, rather than as a crime against the peace and security of mankind under international law. None of those circumstances could serve as a bar to the characterization of the type of conduct concerned as criminal under international law. The distinction between characterization as a crime under national law and characterization as a crime under international law is significant since the corresponding legal regimes differ. This distinction has important implications with respect to the *non bis in idem* principle addressed in article 12.

(11) This provision is consistent with the Charter and the judgement of the Nürnberg Tribunal. The Charter of the Nürnberg Tribunal expressly referred to the relationship between international law and national law with respect to the criminal characterization of particular conduct only in relation to crimes against humanity. Article 6, subparagraph (c) of the Nürnberg Charter characterized as crimes against humanity certain types of conduct "whether or not in violation of the domestic law where perpetrated". In its judgement the Nürnberg Tribunal recognized in general terms what is commonly referred to as the supremacy of international criminal law over national law in the context of the obligations of individuals. In this regard, the Nürnberg Tribunal stated that "... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State".

(12) The Commission recognized the general principle of the autonomy of international law over national law with respect to the criminal characterization of conduct constituting crimes under international law in Principle II of the Nürnberg Principles which stated as follows: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."

(13) It must be pointed out that the clause under consideration concerns only the criminal characterization of certain types of conduct as constituting crimes against the peace and security of mankind under Part II. It is without prejudice to national competence in relation to other matters of criminal law

or procedure, such as the penalties, evidentiary rules, etc., particularly since national courts are expected to play an important role in the implementation of the present Code.

Article 2

Individual responsibility

1. A crime against the peace and security of mankind entails individual responsibility.

2. An individual shall be responsible for the crime of aggression in accordance with article 16.

3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

(a) intentionally commits such a crime;

(b) orders the commission of such a crime which in fact occurs or is attempted;

(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

(d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(e) directly participates in planning or conspiring to commit such a crime which in fact occurs;

(f) directly and publicly incites another individual to commit such a crime which in fact occurs;

(g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

Commentary

(1) The principle of individual responsibility for crimes under international law was clearly established at Nürnberg. The Nürnberg Charter provided for the trial and punishment of *persons* who committed crimes against peace, war crimes or crimes against humanity. 24/ The Nürnberg Tribunal confirmed the direct applicability of international criminal law with respect to the responsibility and punishment of individuals for violations of this law: "It was submitted that international law is concerned with the actions of

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24/ Nürnberg Charter, article 6.

sovereign States, and provides no punishment for individuals ... In the opinion of the Tribunal, [this submission] must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized." 25/ The Nürnberg Tribunal further concluded that "individuals can be punished for violations of international law". 26/ The principle of individual responsibility and punishment for crimes under international law recognized at Nürnberg is the cornerstone of international criminal law. This principle is the enduring legacy of the Nürnberg Charter and Judgement which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable to punishment. The principle of individual responsibility and punishment for crimes under international law was reaffirmed in the Statutes of the International Criminal Tribunals for the former Yugoslavia 27/ (article 7, paragraph 1 and article 23, paragraph 1) and Rwanda (article 6, paragraph 1 and article 22, paragraph 1). 28/ This principle was also reaffirmed by the Commission in the Nürnberg Principles (Principle I) and in the 1954 draft Code (article 1). The punishment of individuals for the crimes covered by the present Code is addressed in article 3 and discussed in the commentary thereto.

(2) The principles of individual criminal responsibility which determine whether an individual can be held accountable for a crime against the peace and security of mankind are set forth in articles 2 to 7 of Part I. As the first article in this series of articles, article 2 deals with a number of important general principles concerning individual criminal responsibility. Paragraph 1 establishes the general principle of individual responsibility for the crimes covered by the present Code. Paragraph 2 reaffirms this principle

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25/ Nürnberg Judgement, p. 52.

26/ Nürnberg Judgement, p. 53.

27/ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, document S/25704.

28/ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994, Security Council resolution 955 (1994).

with respect to the crime of aggression as provided in article 16 which deals with the forms of participation. Paragraph 3 addresses the various forms of participation by which an individual incurs responsibility for the other crimes listed in Part II of the present Code.

(3) Article 2, paragraph 1 reaffirms the principle of individual responsibility for crimes under international law with respect to crimes against the peace and security of mankind. This is clearly indicated by the recognition of the fact that such a crime "entails individual responsibility". Notwithstanding the scope and application of the Code provided for in article 1, paragraph 1, the present paragraph is formulated in general terms to reaffirm the general principle of individual criminal responsibility with respect to all crimes against the peace and security of mankind irrespective of whether such crimes are listed in the present Code. The Commission considered that it was important to reaffirm this general principle in relation to all crimes against the peace and security of mankind to avoid any question concerning its application to crimes of such a character that were not listed in Part II. The Commission adopted a restrictive approach to the inclusion of crimes in Part II while recognizing that there might be other crimes of the same character that were not presently covered by the Code.

(4) Paragraph 1 also indicates that the scope of application of the Code *ratione personae* is limited to "individuals" meaning natural persons. It is true that the act for which an individual is responsible might also be attributable to a State if the individual acted as an "agent of the State", "on behalf of the State", "in the name of the State" or as a de facto agent, without any legal power. For this reason, article 4 establishes that the criminal responsibility of individuals is "without prejudice to any question of the responsibility of States under international law."

(5) Article 2, paragraph 2, deals with individual responsibility for the crime of aggression. In relation to the other crimes included in the Code, paragraph 3 indicates the various manners in which the role of the individual in the commission of a crime gives rise to responsibility: he shall be responsible if he committed the act which constitutes the crime; if he attempted to commit the act; if he failed to prevent the commission of the act; if he incited the commission of the act; if he participated in the planning of the act; if he was an accomplice in its commission. In relation to the crime of aggression, it was not necessary to indicate these different forms of participation which entail the responsibility of the individual,

because the definition of the crime of aggression in article 16 already provides all the elements necessary to establish the responsibility. According to that article, an individual is responsible for the crime of aggression when, as a leader or organizer, he orders or actively participates in the planning, preparation, initiation or waging of aggression committed by a State. The crime of aggression has particular features which distinguish it from the other offences under the Code. Aggression can be committed only by individuals who are agents of the State and who use their power to give orders and the means it makes available in order to commit this crime. All the situations listed in paragraph 3 which would have application in relation to the crime of aggression are already found in the definition of that crime contained in article 16. Hence the reason to have a separate paragraph for the crime of aggression in article 2.

(6) Article 2, paragraph 3 addresses the various ways in which an individual incurs responsibility for participating in or otherwise contributing significantly to a crime set out in articles 17, 18, 19 or 20, namely, by the commission of a crime (subparagraph (a)), by complicity in a crime (subparagraphs (b) to (f)) or by the attempt to commit a crime (subparagraph (g)). Participation only entails responsibility when the crime is actually committed or at least attempted. In some cases it was found useful to mention this requirement in the corresponding subparagraphs in order to dispel possible doubts. It is of course understood that the requirement only extends to the application of the present Code and does not purport to be the assertion of a general principle in the characterization of participation as a source of criminal responsibility. 29/

(7) Subparagraph 3 (a) addresses the responsibility of the individual who actually "commits such a crime". This subparagraph provides that an individual who performs an unlawful act or omission is criminally responsible for this conduct under the present subparagraph. As recognized by the Nürnberg Tribunal, an individual has a duty to comply with the relevant rules of international law and therefore may be held personally responsible for failing to perform this duty. The present subparagraph is intended to cover

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29/ This limitation does not in any way affect the application of the general principles independently of the Code or of similar provisions contained in other instruments, notably article III of the Convention on the Prevention and Punishment of the Crime of Genocide. United Nations, Treaty Series, vol. 78, p. 277.

two possible situations in which an individual "commits" a crime by means of an act or an omission depending on the rule of law that is violated. In the first situation, an individual incurs criminal responsibility for the affirmative conduct of performing an act in violation of the duty to refrain from performing such an act. In the second situation, an individual incurs criminal responsibility for an omission by failing to perform an act in violation of the duty to perform such an act. While recognizing that the word "commit" is generally used to refer to intentional rather than merely negligent or accidental conduct, the Commission decided to use the phrase "intentionally commits" to further underscore the necessary intentional element of crimes against the peace and security of mankind. The principle of individual criminal responsibility under which an individual who commits a crime is held accountable for his own conduct set forth in subparagraph (a) is consistent with the Nürnberg Charter (article 6), the Genocide Convention (article II), the Geneva Conventions of 1949 30/ and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7, paragraph 1) and Rwanda (article 6, paragraph 1). This principle is also consistent with the Nürnberg Principles (Principle I) adopted by the Commission.

(8) Subparagraph (b) addresses the responsibility of the superior who "orders the commission of such a crime". This subparagraph provides that an individual who orders the commission of a crime incurs responsibility for that crime. This principle of criminal responsibility applies to an individual who is in a position of authority and uses his authority to compel another individual to commit a crime. The superior who orders the commission of the crime is in some respects more culpable than the subordinate who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative. The superior contributes significantly to the commission of the crime by using his position of authority to compel the subordinate to commit a crime. The superior who orders the subordinate to commit a crime fails to perform two essential duties which are incumbent upon every individual who is in a position of authority. First,

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30/ See the common article contained in the four Geneva Conventions: Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; Geneva Convention IV, article 146.

the superior fails to perform the duty to ensure the lawful conduct of his subordinates. Second, the superior violates the duty to comply with the law in exercising his authority and thereby abuses the authority that is inherent in his position.

(9) The principle of the criminal responsibility of a superior for purposes of the present Code applies only to those situations in which the subordinate actually carries out or at least attempts to carry out the order to commit the crime, as indicated by the phrase "which in fact occurs or is attempted". In the first case, the criminal responsibility of a superior is limited to situations in which a subordinate actually carries out the order to commit a crime. This limitation on the criminal responsibility of a superior for the crimes contained in articles 17 to 20 is a consequence of the limited scope of the present Code which covers only those crimes under international law which are of such a character as to threaten international peace and security, as discussed in paragraph 6 above. Notwithstanding the absence of criminal responsibility under the present Code, the superior who gives an order to commit a crime which is not carried out would still be subject to the penal or disciplinary measures provided by national law. In the second case, the criminal responsibility of a superior is extended to include situations in which a subordinate attempts and fails to carry out the order to commit a crime since the subordinate would incur criminal responsibility in such a situation under subparagraph (g). It would clearly be a travesty of justice to hold the subordinate responsible for attempting to commit a crime pursuant to the order of his superior while permitting the superior to escape responsibility as a result of the subordinate's failure to successfully carry out the orders. The principle of individual criminal responsibility under which an individual who orders the commission of a crime is held accountable for that crime set forth in subparagraph (b) is consistent with the Geneva Conventions of 1949 31/ and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7, paragraph 1) and Rwanda (article 6, paragraph 1). As indicated in paragraph 6 above, the limitations contained in this subparagraph do not affect the application of the general principles of individual criminal responsibility independently of the present Code or of a similar provision contained in another instrument.

31/ See the common article contained in the four Geneva Conventions: Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention II, article 129; Geneva Convention IV, article 146.

(10) Subparagraph (c) addresses the responsibility of the superior who "fails to prevent or repress the commission of such a crime" by a subordinate "in the circumstances set out in article 6". This subparagraph reaffirms the responsibility of a superior for the failure to perform his duty to prevent or repress the commission of a crime by his subordinate in the circumstances set out in article 6. This principle of individual criminal responsibility is addressed in article 6 and discussed in the commentary thereto.

(11) Subparagraph (d) addresses the criminal responsibility of the accomplice who "assists ... in the commission of such a crime". This subparagraph provides that an individual who "aids, abets or otherwise assists" in the commission of a crime by another individual incurs responsibility for that crime if certain criteria are met. The accomplice must *knowingly* provide assistance to the perpetrator of the crime. Thus, an individual who provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable under the present subparagraph. In addition, the accomplice must provide the kind of assistance which contributes *directly* and *substantially* to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way. In such a situation, an individual is held responsible for his own conduct which contributed to the commission of the crime notwithstanding the fact that the criminal act was carried out by another individual. The principle of individual criminal responsibility for complicity in the commission of a crime set forth in subparagraph (d) is consistent with the Nûrnberg Charter (article 6), the Genocide Convention (article III, paragraph (e)) and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7, paragraph 1) and Rwanda (article 6, paragraph 1). This principle is also consistent with the Nûrnberg Principles (Principle VII) and the 1954 draft Code (article 2, paragraph 13 (iii)) adopted by the Commission.

(12) The Commission concluded that complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.

(13) Subparagraph (e) addresses the responsibility of the planner or the co-conspirator who "participates in planning or conspiring to commit such a crime". This subparagraph provides that an individual who participates

directly in planning or conspiring to commit a crime incurs responsibility for that crime even when it is actually committed by another individual. The term "directly" is used to indicate that the individual must in fact participate in some meaningful way in formulating the criminal plan or policy, including endorsing such a plan or policy proposed by another. The planner who formulates the detailed plans for carrying out a crime is in some respects more culpable that the perpetrator who carries out a plan to commit a crime that he would not otherwise have committed. Similarly, the individuals who conspire to commit a crime contribute significantly to the commission of the crime by participating jointly in formulating a plan to commit a crime and by joining together in pursuing their criminal endeavour. The phrase "which in fact occurs" indicates that the criminal responsibility of an individual who, acting alone or with other individuals, participates in planning a crime set out in articles 17 to 20 is limited to situations in which the criminal plan is in fact carried out. Subparagraph (e) of article 2 sets forth a principle of individual responsibility with respect to a particular form of participation in a crime rather than creating a separate and distinct offence or crime. [32]

(14) Subparagraph (e) is intended to ensure that high-level government officials or military commanders who formulate a criminal plan or policy, as individuals or as co-conspirators, are held accountable for the major role that they play which is often a decisive factor in the commission of the crimes covered by the Code. This principle of individual responsibility is of particular importance for the crimes set forth in articles 17 to 20 which by their very nature often require the formulation of a plan or a systematic policy by senior government officials and military commanders. Such a plan or policy may require more detailed elaboration by individuals in mid-level positions in the governmental hierarchy or the military command structure who are responsible for ordering the implementation of the general plans or policies formulated by senior officials. The criminal responsibility of the mid-level officials who order their subordinates to commit the crimes is provided for in subparagraph (b). Such a plan or policy may also require a number of individuals in low-level positions to take the necessary action to carry out the criminal plan or policy. The criminal responsibility of the

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[32] This is consistent with the Nürnberg Judgement which treated conspiracy as a form of participation in a crime against peace rather than as a separate crime. Nürnberg Judgement, 56.

subordinates who actually commit the crimes is provided for in subparagraph (a). Thus, the combined effect of subparagraphs (a), (b) and (e) is to ensure that the principle of criminal responsibility applies to all individuals throughout the governmental hierarchy or the military chain of command who contribute in one way or another to the commission of a crime set out in articles 17 to 20.

(15) The principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime was recognized in the Nürnberg Charter (article 6), the Genocide Convention (article III, paragraph (b)) and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7, paragraph 1 (planning)) and Rwanda (article 6, paragraph 1 (planning)). The Commission also recognized conspiracy as a form of participation in a crime against peace in the Nürnberg Principles (Principle VI) and more generally in the 1954 draft Code (article 2, paragraph 13 (i)). 33/

(16) Subparagraph (f) addresses the responsibility of the instigator who "incites another individual to commit such a crime". This subparagraph provides that an individual who directly and publicly incites another individual to commit a crime incurs responsibility for that crime. Such an individual urges and encourages another individual to commit a crime and thereby contributes substantially to the commission of that crime. The principle of individual criminal responsibility set forth in this subparagraph applies only to direct and public incitement. The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion. The equally indispensable element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technological

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33/ Instead of the French term complot, the Commission preferred the term entente, which was taken from article III of the Genocide Convention and differed, in French at least, from the term used in the 1954 draft Code and in Principle VI of the Nürnberg Principles. Entente and complot were both translations of the word "conspiracy", which was used in the English version of the present subparagraph.

means of mass communication, such as by radio or television. 34/ This public appeal for criminal action increases the likelihood that at least one individual will respond to the appeal and, moreover, encourages the kind of "mob violence" in which a number of individuals engage in criminal conduct. Private incitement to commit a crime would be covered by the principle of individual criminal responsibility relating to individuals who jointly plan or conspire to commit a crime set forth in subparagraph (e). The phrase "which in fact occurs" indicates that the criminal responsibility of an individual for inciting another individual to commit a crime set out in articles 17 to 20 is limited to situations in which the other individual actually commits that crime, as discussed in paragraph 6 above. The principle of individual criminal responsibility for incitement was recognized in the Nürnberg Charter (article 6 (instigation)), the Genocide Convention (article III, paragraph c) and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7, paragraph 1 (instigation)) and Rwanda (article 6, paragraph 1 (instigation)). This principle was also recognized by the Commission in the 1954 draft Code (article 2, paragraph 13 (ii)).

(17) Subparagraph (g) addresses the responsibility of an individual who "attempts to commit such a crime". This subparagraph provides for the criminal responsibility of an individual who forms the intent to commit a crime, commits an act to carry out this intention and fails to successfully complete the crime only because of some independent factor which prevents him from doing so. Thus, an individual incurs criminal responsibility for unsuccessfully attempting to commit a crime only when the following elements are present: (a) intent to commit a particular crime; (b) an act designed to commit it; and (c) non-completion of the crime for reasons independent of the perpetrator's will. The phrase "by taking action commencing the execution of a crime" is used to indicate that the individual has performed an act which constitutes a significant step towards the completion of the crime. The phrase "which does not in fact occur" recognizes that the notion of attempt by definition only applies to situations in which an individual endeavours to commit a crime and fails in this endeavour. The Commission decided to

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34/ The tragic events in Rwanda demonstrated the even greater effect of communicating the call for criminal action by technological means of mass communication which enable an individual to reach a much larger number of people and to repeat the message of incitement. See Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), document S/1994/1405.

recognize this exception to the requirement that a crime in fact occurred which applies to the other principles of individual criminal responsibility set forth in paragraph 3 for two reasons. First, a high degree of culpability attaches to an individual who attempts to commit a crime and is unsuccessful only because of circumstances beyond his control rather than his own decision to abandon the criminal endeavour. Second, the fact that an individual has taken a significant step towards the completion of one of the crimes set out in articles 17 to 20 entails a threat to international peace and security because of the very serious nature of these crimes. The principle of individual criminal responsibility for attempt was recognized in the Genocide Convention (article III, paragraph (d)). This principle was also recognized by the Commission in the 1954 draft Code (article 2, paragraph 13 (iv)).

Article 3

Punishment

> An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.

Commentary

(1) As discussed in the commentary to article 2, the Charter and the Judgement of the Nürnberg Tribunal clearly established the principle that an individual not only incurs responsibility, but is also liable to punishment for conduct which constitutes a crime under international law. The Charter provided for the punishment of individuals responsible for violations of international law which constituted crimes under international law, namely, crimes against peace, war crimes or crimes against humanity. In its judgement, the Tribunal explicitly recognized that "individuals can be punished for violations of international law". It also emphasized that "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." 35/ Thus, international criminal law performs the same three essential functions as national criminal law, by providing the rule of law which establishes the standard of conduct

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35/ Nürnberg Judgement, p. 223.

for individuals, by providing for the principle of individual responsibility and for the principle of punishment for violations of that standard and, accordingly, a deterrent against such violations.

(2) Article 3 consists of two closely related provisions. The first provision sets out the general principle whereby anyone who commits a crime against the peace and security of mankind is responsible for that crime. The second, more specific, provision concerns the punishment which such responsibility entails, namely, the applicable penalty, which must be proportionate to the character and gravity of the crime in question.

(3) The character of a crime is what distinguishes that crime from another crime. A crime of aggression is to be distinguished from a crime against humanity, which is to be distinguished from a war crime. The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author. Was the crime premeditated? Was it preceded by preparations (stratagem or ambush)? The gravity is also inferred from the feelings which impelled the individual, and which are generally called the motive. It, too, is inferred from the way in which it was executed: cruelty or barbarity. An individual may not only have intended to commit a criminal act, but also, in so doing, to inflict maximum pain or suffering on the victim. Hence, while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty.

(4) The authors of this draft have not specified a penalty for each crime, since everything depends on the legal system adopted to try the persons who commit crimes against the peace and security of humanity.

(5) In the case of a system of universal jurisdiction, it is each State declaring that it is competent that will determine the applicable penalty; the penalty may, for example, involve a maximum and a minimum, and may or may not admit extenuating or aggravating circumstances.

(6) In this case, the court may, in applying the penalty, determine from the scale of penalties established by the State the most appropriate penalty and decide whether or not there are extenuating or aggravating circumstances.

(7) If, on the other hand, jurisdiction lies with an international court, the applicable penalty shall be determined by an international convention, either in the statute of the international court or in another instrument if the statute of the international court does not so provide. It is, in any event,

not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nürnberg Judgement 36/ and in article 15 (2) of the International Covenant on Civil and Political Rights.

Article 4

Responsibility of States

> The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Commentary

(1) Although, as made clear by article 2, the present Code addresses matters relating to the responsibility of individuals for the crimes set out in Part II, it is possible, indeed likely, as pointed out in the commentary to article 2, that an individual may commit a crime against the peace and security of mankind as an "agent of the State", "on behalf of the State", "in the name of the State" or even in a de facto relationship with the State, without being vested with any legal power.

(2) The "without prejudice" clause contained in article 4 indicates that the present Code is without prejudice to any question of the responsibility of a State under international law for a crime committed by one of its agents. As the Commission already emphasized in the commentary to article 19 of the draft articles on State responsibility, the punishment of individuals who are organs of the State "certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs". 37/ The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.

36/ Nürnberg Judgement, pp. 49-51.

37/ Yearbook ... 1976, vol. II (Part Two), p. 104, document A/31/10, paragraph (21) of the commentary to article 19.

Article 5

Order of a Government or a superior

> The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.

Commentary

(1) Crimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command. This is particularly true with respect to the crimes under international law which are of such gravity or magnitude, are committed on such a massive or widespread scale or are committed on such a planned or systematic basis as to constitute a threat to international peace and security and thereby qualify for inclusion in the Code.

(2) The principles of individual criminal responsibility set forth in article 2 address the various ways in which an individual incurs criminal responsibility for directly or indirectly contributing to the commission of a crime covered by the Code. The provisions concerning superior orders, command responsibility and official position contained in articles 5 to 7 are intended to ensure that the principles of individual criminal responsibility apply equally and without exception to any individual throughout the governmental hierarchy or military chain of command who contributes to the commission of such a crime. Thus, for example, a governmental official who plans or formulates a genocidal policy, a military commander or officer who orders a subordinate to commit a genocidal act to implement such a policy or knowingly fails to prevent or suppress such an act and a subordinate who carries out an order to commit a genocidal act contribute to the eventual commission of the crime of genocide. Justice requires that all such individuals be held accountable.

(3) Article 5 addresses the criminal responsibility of a subordinate who commits a crime while acting pursuant to an order of a Government or a superior. The government official who formulates a criminal plan or policy and the military commander or officer who orders the commission of a criminal act in the implementation of such a plan or policy bear particular responsibility for the eventual commission of the crime. However, the culpability and the indispensable role of the subordinate who actually commits

the criminal act cannot be ignored. Otherwise the legal force and effect of the prohibition of crimes under international law would be substantially weakened by the absence of any responsibility or punishment on the part of the actual perpetrators of these heinous crimes and thus of any deterrence on the part of the potential perpetrators thereof.

(4) The plea of superior orders is most frequently claimed as a defence by subordinates who are charged with the type of criminal conduct covered by the Code. Since the Second World War the fact that a subordinate acted pursuant to an order of a government or a superior has been consistently rejected as a basis for relieving a subordinate of responsibility for a crime under international law. In this regard, the Nürnberg Charter provided in article 8 that "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." 38/ Most of the major war criminals tried by the Nürnberg Tribunal raised as a defence the fact that they were acting pursuant to the orders of their superior. The Nürnberg Tribunal rejected the plea of superior orders as a defence and stated: "The provisions of this Article [article 8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment." 39/ The defence of superior orders has been consistently excluded in the relevant legal instruments adopted since the Nürnberg Charter, including the Tokyo Tribunal Charter (article 6), Control Council Law No. 10 (article 4) and, more recently, the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7) and Rwanda (article 6). The absence of a defence based on the mere existence of superior orders was also recognized by the Commission in the Nürnberg Principles 40/ (Principle IV) and the 1954 draft Code 41/ (article 4).

38/ Nürnberg Charter, supra note 19.

39/ Nürnberg Judgement, supra note 20, p. 53.

40/ Supra note 22.

41/ Supra note 23.

(5) Notwithstanding the absence of any defence based on superior orders, the fact that a subordinate committed a crime while acting pursuant to an order of his superior was recognized as a possible mitigating factor which could result in a less severe punishment in the Nürnberg Charter and the subsequent legal instruments referred to in the preceding paragraph. The mere existence of superior orders will not automatically result in the imposition of a lesser penalty. A subordinate is subject to a lesser punishment only when a superior order in fact lessens the degree of his culpability. For example, a subordinate who is a willing participate in a crime irrespective of an order of his superior incurs the same degree of culpability as if there had been no such order. In such a situation, the existence of the superior order does not exert any undue influence on the behaviour of the subordinate. In contrast, a subordinate who unwillingly commits a crime pursuant to an order of a superior because of the fear of serious consequences for himself or his family resulting from a failure to carry out that order does not incur the same degree of culpability as a subordinate who willingly participates in the commission of the crime. The fact that a subordinate unwillingly committed a crime pursuant to an order of a superior to avoid serious consequences for himself or his family resulting from the failure to carry out that order under the circumstances at the time may justify a reduction in the penalty that would otherwise be imposed to take into account the lesser degree of culpability. The phrase "if justice so requires" is used to show that even in such cases the imposition of a lesser punishment must also be consistent with the interests of justice. In this regard, the competent court must consider whether a subordinate was justified in carrying out an order to commit a crime to avoid the consequences resulting from a failure to carry out that order. Thus, the court must weigh the seriousness of the consequences that in fact resulted from the order having been carried out, on the one hand, and the seriousness of the consequences that would have most likely resulted from the failure to carry out the order under the circumstances at the time, on the other. At one end of the scale, the court would have no reason to show any mercy for a subordinate who committed a heinous crime pursuant to a superior order in the absence of an immediate or otherwise significant risk of serious consequences resulting from the failure to comply with that order. At the other end of the scale, a court may decide that justice requires imposing a lesser punishment on a subordinate who committed a serious crime pursuant to a

superior order only to avoid an immediate or otherwise significant risk of equally or more serious consequences resulting from a failure to comply with that order. 42/

(6) Article 5 reaffirms the principle of individual criminal responsibility under which a subordinate is held accountable for a crime against the peace and security of mankind notwithstanding the fact that he committed such a crime while acting under the orders or a Government or a superior. It also reaffirms the possibility of considering superior orders as a mitigating factor in determining the appropriate punishment when justice so requires. The text of the article is based on the relevant provisions contained in the Nürnberg Charter and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. It is intended to reaffirm the existing rule of international law under which the mere fact that an individual committed a crime while acting pursuant to the order of his Government or his superior will not shield him from criminal responsibility for his conduct but may constitute a mitigating factor in certain situations when justice so requires.

Article 6

Responsibility of the superior

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

Commentary

(1) Military commanders are responsible for the conduct of members of the armed forces under their command and other persons under their control. This principle of command responsibility was recognized in the 1907 Hague Convention 43/ and reaffirmed in subsequent legal

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42/ See H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes", British Yearbook of International Law 1944, vol. 21, p. 73.

43/ Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, article 1 of the regulations annexed thereto, Bevans, vol. I, p. 631.

instruments. 44/ It requires that members of the armed forces be placed under the command of a superior who is responsible for their conduct. A military commander may be held criminally responsible for the unlawful conduct of his subordinates if he contributes directly or indirectly to their commission of a crime. A military commander contributes directly to the commission of a crime when he orders his subordinate to carry out a criminal act, such as killing an unarmed civilian, or to refrain from performing an act which the subordinate has a duty to perform, such as refraining from providing food for prisoners of war which results in their starvation. The criminal responsibility of a military commander in this first situation is addressed in article 2. A military commander also contributes indirectly to the commission of a crime by his subordinate by failing to prevent or repress the unlawful conduct. The criminal responsibility of a military commander in this second situation is addressed in article 6.

(2) The criminal responsibility of a military commander for failing to prevent or repress the unlawful conduct of his subordinates was not provided for in the Nürnberg Charter or recognized by the Nürnberg Tribunal. However, this type of criminal responsibility was recognized in several judicial decisions after the Second World War. The United States Supreme Court, in the *Yamashita* case, gave an affirmative answer to the question whether the laws of war imposed on an army commander a duty to take such appropriate measures as were within his power to control the troops under his command and prevent them from committing acts in violation of the laws of war. The court held that General Yamashita was criminally responsible because he had failed to take such measures. 45/ Similarly, the United States Military Tribunal, in the *German High Command Trial*, stated that "Under basic principles of command authority and responsibility, an officer who merely stands by while his

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44/ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Additional Protocol I], article 43, 8 June 1977, United Nations, Treaty Series, vol. 1125, p. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Additional Protocol II], article 1, 8 June 1977, United Nations, Treaty Series, vol. 1125, p. 609.

45/ See Law Reports of Trials of War Criminals, (15-volume series, prepared by the United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949) vol. IV, p. 43; and United States Reports (Washington, D.C.), vol. 327 (1947), pp. 14-15.

subordinates execute a criminal order of his superiors which he knows is criminal, violates a moral obligation under International Law. By doing so, he cannot wash his hands of international responsibility". 46/ In addition, in the *Hostages Trial*, the United States Military Tribunal stated that "a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about". 47/ For its part, the Tokyo Tribunal decided that it was the duty of *all* those on whom responsibility rested to secure proper treatment of prisoners and to prevent their ill-treatment. 48/

(3) An individual incurs criminal responsibility for the failure to act only when there is a legal obligation to act and the failure to perform this obligation results in a crime. The duty of commanders with respect to the conduct of their subordinates is set forth in article 87 of Additional Protocol I. This article recognizes that a military commander has a duty to prevent and to suppress violations of international humanitarian law committed by his subordinates. This article also recognizes that a military commander has a duty, where appropriate, to initiate disciplinary or penal action against alleged offenders who are his subordinates. The principle of individual criminal responsibility under which a military commander is held responsible for his failure to prevent or repress the unlawful conduct of his subordinates is elaborated in article 86 of Additional Protocol I. This principle is also contained in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7) and Rwanda (article 6).

(4) Article 6 confirms the individual criminal responsibility of the superior who is held accountable for a crime against the peace and security of mankind committed by his subordinate if certain criteria are met. The text of this article is based on the three instruments mentioned in the preceding paragraph. The article begins by referring to the fact that a crime has been committed by a subordinate does not relieve his superiors of their own

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46/ Law Reports of Trials ..., vol. XII, p. 75.

47/ See Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 (Nürnberg, October 1946-April 1949) (15-volume series) (Washington, D.C., US Government Printing Office, 1949-1953), case No. 7, vol. XI, p. 1303.

48/ Law Reports of Trials ..., vol. XV, p. 73.

responsibility for contributing to the commission of the crime. It recognizes that the subordinate incurs criminal responsibility for his direct participation in the criminal conduct as set forth in article 2. It further recognizes that holding a subordinate accountable for the perpetration of a crime does not relieve his superiors of any criminal responsibility they may have incurred by failing to perform their duty to prevent or repress the crime. The duty of a superior to repress the unlawful conduct of his subordinates includes the duty, where appropriate, to initiate disciplinary or penal action against an alleged offender. The criminal responsibility of a superior for the failure to perform the duty to punish a subordinate who engages in unlawful conduct was expressly recognized in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The principle of the individual criminal responsibility of a superior only applies to the conduct of his subordinate or other person under his control. Thus, a superior incurs criminal responsibility only when he fails to prevent or repress the unlawful conduct of such individuals. The reference to "his superiors" indicates that this principle applies not only to the immediate superior of a subordinate, but also to his other superiors in the military chain of command or the governmental hierarchy if the necessary criteria are met. The reference to "superiors" is sufficiently broad to cover military commanders or other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates. 49/ In addition, the reference to "a crime against the peace and security of mankind" indicates that the responsibility of a superior for the unlawful conduct of his subordinate extends not only to war crimes, but also to the other crimes listed in Part II.

(5) Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or had reason to know in the circumstances at the time that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first

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49/ "Unfortunately history is full of examples of civilian authorities which have been guilty of war crimes; thus not only military authorities are concerned." Claude Pilloud et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, commentary to article 86 of Additional Protocol I, p. 1010, footnote 16 (citation omitted) (1987).

situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime. In this situation, he may be considered to be an accomplice to the crime under general principles of criminal law relating to complicity. In the second situation, he has sufficient relevant information to enable him to conclude under the circumstances at the time that his subordinates are committing or are about to commit a crime. In this situation, a superior does not have actual knowledge of the unlawful conduct being planned or perpetrated by his subordinates, but he has sufficient, relevant information of a general nature that would enable him to conclude that this is the case. A superior who simply ignores information which clearly indicates the likelihood of criminal conduct on the part of his subordinates is seriously negligent in failing to perform his duty to prevent or suppress such conduct by failing to make a reasonable effort to obtain the necessary information that will enable him to take appropriate action. As indicated in the commentary to article 86 of Additional Protocol I, "this does not mean that every case of negligence may be criminal...[T]he negligence must be so serious that it is tantamount to malicious intent". 50/ The phrase "had reason to know" is taken from the statutes of the ad hoc tribunals and should be understood as having the same meaning as the phrase "had information enabling them to conclude" which is used in Additional Protocol I. The Commission decided to use the former phrase to ensure an objective rather than a subjective interpretation of this element of the first criterion.

(6) The second criterion requires that a superior failed to take all necessary measures within his power to prevent or repress the criminal conduct of his subordinate. This second criterion is based on the duty of a superior to command and to exercise control over his subordinates. A superior incurs criminal responsibility only if he could have taken the necessary measures to prevent or to repress the unlawful conduct of his subordinates and he failed to do so. This second criterion recognizes that there may be situations in which a military commander knows or has reason to know of the unlawful conduct of his subordinates, but he is incapable of preventing or repressing this conduct. The Commission decided that, for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such

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50/ Commentary to Additional Protocol I, p. 1012.

measures. Thus, a superior would not incur criminal responsibility for failing to perform an act which was impossible to perform in either respect.

Article 7

Official position and responsibility

> The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Commentary

(1) As indicated in the commentary to article 5, crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.

(2) The official position of an individual, including a head of State, was excluded as a defence to a crime under international law or as a mitigating factor in determining the commensurate punishment for such a crime in the Nürnberg Charter which in article 7 states:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment. [51]

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[51] Supra note 19.

(3) In accordance with this provision, the Nürnberg Tribunal rejected the plea of act of State and that of immunity which were submitted by several defendants as a valid defence or ground for immunity:

> It was submitted that ... where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this submission] must be rejected.
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> ... The principle of international law, which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.
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> ... [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law. 52/

(4) The official position of an individual has been consistently excluded as a possible defence to crimes under international law in the relevant instruments adopted since the Nürnberg Charter, including the Tokyo Tribunal Charter (article 6), 53/ Control Council Law No. 10 (article 4) and, more recently, the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 7) and Rwanda (article 6). The absence of such a defence was also recognized by the Commission in the Nürnberg Principles 54/ (Principle III) and the 1954 draft Code 55/ (article 3).

(5) Article 7 reaffirms the principle of individual criminal responsibility under which an official is held accountable for a crime against the peace and security of mankind notwithstanding his official position at the time of its commission. The text of this article is similar to the relevant provisions

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52/ Nürnberg Judgement pp. 52-53.

53/ *Supra* note 19.

54/ *Supra* note 22.

55/ *Supra* note 22.

contained in the Nürnberg Charter and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The phrase "even if he acted as head of State or Government" reaffirms the application of the principle contained in the present article to the individuals who occupy the highest official positions and therefore have the greatest powers of decision.

(6) Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. As recognized by the Nürnberg Tribunal in its judgement, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act. As further recognized by the Nürnberg Tribunal in its judgement, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. 56/ It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.

(7) The Commission decided that it would be inappropriate to consider official position as a mitigating factor in the light of the particular responsibility of an individual in such a position for the crimes covered by the Code. The exclusion of official position as a mitigating factor is therefore expressly reaffirmed in the present article. The official position of an individual has also been excluded as a mitigating factor in determining the commensurate punishment for crimes under international law in almost all of the relevant legal instruments, including the Nürnberg Charter, Control Council Law No. 10 and the Statutes of the International Criminal Tribunals.

56/ Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment.

The Tokyo Tribunal Charter was the only legal instrument which indicated the possibility of considering official position as a mitigating factor when justice so required.

Article 8

Establishment of jurisdiction

> Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Commentary

(1) Article 8 is the first in a series of articles contained in Part I which address procedural and jurisdictional issues relating to the implementation of the present Code. In this regard, article 8 addresses as a preliminary matter the establishment of the jurisdiction of a court to determine the question of the responsibility and, where appropriate, the punishment of an individual for a crime covered by the present Code by applying the principles of individual criminal responsibility and punishment contained in articles 2 to 7 of Part I in relation to the definitions of the crimes set out in articles 16 to 20 of Part II.

(2) Article 8 establishes two separate jurisdictional regimes: one for the crimes set out in articles 17 to 20 and another for the crime set out in article 16. The first regime provides for the concurrent jurisdiction of national courts and an international criminal court for the crimes set out in articles 17 to 20, namely, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. The second regime provides for the exclusive jurisdiction of an international criminal court with respect to the crime of aggression set out in article 16 subject to a limited exception. The Commission decided to adopt a combined approach to the implementation of the present Code based on the concurrent jurisdiction of national courts and an international criminal court for the crimes covered by the Code with the exception of the crime of aggression, as discussed below.

(3) As the twentieth century draws to a close, the world remains plagued by the all too frequent occurrence of the most serious crimes that are of concern to the international community as a whole, including genocide, crimes against

humanity, crimes against United Nations and associated personnel and war crimes. Since the Second World War, States have adopted a number of multilateral conventions in an effort to respond to these particularly serious crimes. The relevant conventions rely at least in part on national jurisdiction for the prosecution and punishment of offenders (*e.g.*, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter Genocide Convention], article VI; 57/ the 1949 Geneva Conventions for the Protection of War Victims (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter Geneva Convention I], article 49; 58/ Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [hereinafter Geneva Convention II], article 50; 59/ Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter Geneva Convention III], article 129; 60/ and Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Geneva Convention IV], article 146 61/); the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* [hereinafter *Apartheid* Convention], article V; 62/ and the 1994 Convention on the Safety of United Nations and Associated Personnel, article 14). 63/

(4) There are only two conventions which expressly provide for the possibility of the prosecution and punishment of offenders by an international criminal court, namely, the Genocide Convention (article VI) 64/ and the

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57/ United Nations, Treaty Series, vol. 78, p. 277.

58/ Ibid., vol. 75, p. 31.

59/ Ibid., vol. 75, p. 85.

60/ Ibid., vol. 75, p. 135.

61/ Ibid., vol. 75, p. 287.

62/ General Assembly resolution 3068 (XXVIII), Annex.

63/ General Assembly resolution 49/59, Annex.

64/ United Nations, Treaty Series, vol. 78, p. 277.

Apartheid Convention (article V). 65/ However, these conventions also envisage a role for national courts in the prosecution and punishment of offenders by providing for the concurrent, rather than the exclusive, jurisdiction of an international court. In the draft statute for an international criminal court which it recently elaborated, the Commission also opted for an international criminal court with concurrent jurisdiction that would complement rather than replace the jurisdiction of national courts. 66/ Similarly, the Statutes of the International Criminal Tribunals for the former Yugoslavia 67/ and for Rwanda 68/ provide for the concurrent jurisdiction of the international tribunals and national courts. Thus, the international community has recognized the important role to be played by an international criminal court in the implementation of international criminal law while at the same time recognizing the continuing importance of the role to be played by national courts in this respect. As a practical matter it would be virtually impossible for an international criminal court to single-handedly prosecute and punish the countless individuals who are responsible for crimes under international law not only because of the frequency with which such crimes have been committed in recent years, but also because these crimes are often committed as part of a general plan or policy which involves the participation of a substantial number of individuals in systematic or massive criminal conduct in relation to a multiplicity of victims.

65/ General Assembly resolution 3068 (XXVIII), Annex.

66/ See the preamble to the draft statute, United Nations document A/49/10, p. 43.

67/ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [hereinafter Statute of the International Criminal Tribunal for the former Yugoslavia], article 9, United Nations document S/25704.

68/ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 [hereinafter Statute of the International Criminal Tribunal for Rwanda], Security Council resolution 955 (1994).

(5) The Commission considered that the effective implementation of the present Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court. The present article therefore establishes the principle of the concurrent jurisdiction of the national courts of all States parties to the present Code based on the principle of universal jurisdiction and the jurisdiction of an international criminal court for the crimes set out in articles 17 to 20 of Part II. This approach recognizes, on the one hand, that no permanent international criminal court is in existence at the present stage of development of the international society and, on the other hand, that the General Assembly has recently decided to convene a preparatory committee to continue work on the draft statute for a permanent court elaborated by the Commission. 69/

(6) The first provision of article 8 establishes the principle of the concurrent jurisdiction of the national courts of the States parties to the Code and an international criminal court for the crimes set out in articles 17 to 20 of Part II. As regards national court jurisdiction, the first provision of the present article is a corollary of article 9 which establishes the obligation of a State party to extradite or prosecute an individual who is allegedly responsible for such a crime. In this regard, the provision is intended to secure the possibility for the custodial State to fulfil its obligation to extradite or prosecute by opting for the second alternative with respect to such an individual. This alternative for the custodial State consists of the prosecution of that individual by its competent national authorities in a national court. It is meaningful only to the extent that the courts of the custodial State have the necessary jurisdiction over the crimes set out in articles 17 to 20 to enable that State to opt for the prosecution alternative. Failing such jurisdiction, the custodial State would be forced to accept any request received for extradition which would be contrary to the alternative nature of the obligation to extradite or prosecute under which the custodial State does not have an absolute obligation to grant a request for extradition. Moreover, the alleged offender would elude prosecution in such a situation if the custodial State did not receive any request for extradition which would seriously undermine the fundamental

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69/ General Assembly resolution 50/46.

purpose of the *aut dedere aut judicare* principle, namely, to ensure the effective prosecution and punishment of offenders by providing for the residual jurisdiction of the custodial State.

(7) Jurisdiction over the crimes covered by the Code is determined in the first case by international law and in the second case by national law. As regards international law, any State party is entitled to exercise jurisdiction over an individual allegedly responsible for a crime under international law set out in articles 17 to 20 who is present in its territory under the principle of "universal jurisdiction" set forth in article 9. The phrase "irrespective of where or by whom those crimes were committed" is used in the first provision of the present article to avoid any doubt as to the existence of universal jurisdiction for those crimes.

(8) As regards the crime of genocide, the Commission noted that the Convention on the Prevention and Punishment of the Crime of Genocide (article VI) restricted national court jurisdiction for this crime to the State in whose territory the crime occurred. The present provision extends national court jurisdiction over the crime of genocide set out in article 17 to every State party to the Code. The Commission considered that such an extension was fully justified in view of the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein. Unfortunately, the international community had repeatedly witnessed the ineffectiveness of the limited jurisdictional regime provided by the Convention for the prosecution and punishment of individuals responsible for the crime of genocide during the last half century since its adoption. The impunity of such individuals remained virtually the rule rather than the exception notwithstanding the fundamental aims of the Convention. Moreover, this impunity deprived the prohibition of the crime of genocide of the deterrent effect that was an essential element of criminal law due to the absence of any real prospect of enforcing the principles of individual responsibility and punishment for this crime in most instances. This regrettable state of affairs was only partly due to the non-existence of the international penal tribunal envisaged in article VI of the Convention which, as a practical matter, could not possibly have prosecuted and punished all of the individuals who were responsible for crimes of genocide committed at various times and in various places in the course of recent history. The

Commission considered that a more effective jurisdictional regime was necessary to give meaning to the prohibition of genocide as one of the most serious crimes under international law which had such tragic consequences for humanity and endangered international peace and security.

(9) The present provision is intended to give effect to the entitlement of States parties to exercise jurisdiction over the crimes set out in articles 17 to 20 under the principle of universal jurisdiction by ensuring that such jurisdiction is appropriately reflected in the national law of each State party. The phrase "shall take such measures as may be necessary" defines the relevant obligation of a State party in flexible terms to take account of the fact that constitutional and other national law requirements for the exercise of criminal jurisdiction vary from State to State. Thus, a State party is required to take those measures, if any, that are necessary to enable it to exercise jurisdiction over the crimes set out in articles 17 to 20 in accordance with the relevant provisions of its national law.

(10) In addition, the present provision is intended to require a State party to enact any procedural or substantive measures that may be necessary to enable it to effectively exercise jurisdiction in a particular case with respect to an individual who is allegedly responsible for a crime set out in articles 17 to 20. 70/ Article 8 substantially reproduces paragraph 3 of article 2 of the draft on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons prepared by the Commission. As indicated in paragraph (11) of the commentary to the said provision, the intention is "to provide for the exercise of jurisdiction in a broad sense, that is as regards both substantive and procedural criminal law. In order to eliminate any possible doubts on the point, the Commission decided

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70/ In this regard, article V of the Convention on the Prevention and Punishment of the Crime of Genocide states as follows: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the acts enumerated in article III." United Nations, Treaty Series, vol. 78, p. 277. The Geneva Conventions on the Protection of War Victims also contain a common provision under which States parties "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches...." Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; Geneva Convention IV, article 146.

to include ... a specific requirement, such as is found in The Hague and the Montreal Conventions and in the Rome draft, 71/ concerning the establishment of jurisdiction." 72/

(11) The recognition of the principle of the universal jurisdiction of the national courts of States parties to the Code for the crimes set out in articles 17 to 20 does not preclude the possibility of the jurisdiction of an international criminal court for those crimes, as indicated by the opening clause of the first provision which states that it is "without prejudice to the jurisdiction of an international criminal court". The possible jurisdiction of an international criminal court for the crimes set out in articles 17 to 20 was formulated as a without prejudice clause in view of the fact that the international legal system does not yet include such a court with jurisdiction over the crimes set out in the present Code, as such, in contrast to the International Criminal Tribunals for the former Yugoslavia and Rwanda which have jurisdiction over the crimes set out in their respective statutes. The jurisdiction of these tribunals extends to many of the crimes under international law set out in Part II of the present Code, but not as crimes against the peace and security of mankind under the Code. Thus, the present provision and indeed the present Code do not apply to those tribunals which are governed by their respective statutes.

(12) The present provision envisages the concurrent jurisdiction of an international criminal court in relation to the crimes set out in articles 17 to 20 to complement the national court jurisdiction envisaged for those crimes and thereby enhance the effective implementation of the Code in that respect. The priority to be given to national court jurisdiction or international court jurisdiction is not addressed in the present article since this question would no doubt be addressed in the statute of the international criminal court. The term "international criminal court" is used to refer to a competent, impartial and independent court or tribunal established by law in accordance with the right of an accused to be tried by such a judicial body which is recognized in the International Covenant on Civil and Political Rights (article 14, paragraph 1). In addition, this term should be understood as referring to a court established with the support of the international community. An

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71/ Yearbook...1972, vol. II, p. 335.

72/ Ibid., p. 336.

international criminal court could effectively exercise jurisdiction over the crimes covered by the Code and thereby alleviate rather than exacerbate the threat to international peace and security resulting from those crimes only if it had the broad support of the international community. The present provision envisaged the jurisdiction of an international criminal court established with the broad support of the international community without indicating the method of establishment for such a court. In this regard, the Commission noted that this question was presently under consideration within the framework of the United Nations in connection with the draft statute for an international criminal court adopted by the Commission in 1994.

(13) The second and third provisions of the present article comprise a separate jurisdictional regime for the crime of aggression set out in article 16. This jurisdictional regime provides for the exclusive jurisdiction of an international criminal court for the crime of aggression with the singular exception of the national jurisdiction of the State which has committed aggression over its own nationals. The term "international criminal court" has the same meaning in the first and second provision of the present article in relation to the two separate jurisdictional regimes envisaged for the crimes set out in articles 17 to 20 in the first instance and the crime set out in article 16 in the second instance. Thus, the criteria for an international criminal court discussed in the context of the first jurisdictional regime are equally applicable in the present context.

(14) The second provision of the present article establishes the principle of the exclusive jurisdiction of an international criminal court in determining the responsibility and, where appropriate, the punishment of individuals who are responsible for the crime of aggression set out in article 16 subject to the singular exception recognized in the third provision of the present article which is discussed below. This principle of exclusive jurisdiction is the result of the unique character of the crime of aggression in the sense that the responsibility of an individual for participation in this crime is established by his participation in a sufficiently serious violation of the prohibition of certain conduct by States contained in Article 2, paragraph 4 of the United Nations Charter. The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime

without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.

(15) The third provision of the present article recognizes a singular national court jurisdiction exception to the otherwise exclusive jurisdiction of an international criminal court under the second jurisdictional regime for the crime of aggression. The only State that could try an individual for the crime of aggression in its national courts under this provision is the State referred to in article 16, namely the State whose leaders participated in the act of aggression. This is the only State which could determine the responsibility of such a leader for the crime of aggression without being required to also consider the question of aggression by another State. Thus, the national courts of such a State could determine the responsibility of an individual for the crime of aggression under the present Code or under such relevant provisions of national criminal law as may be applicable. The determination of the responsibility of the leaders for their participation in the crime of aggression by the national courts of the State concerned may be essential to a process of national reconciliation. In addition, the exercise of national jurisdiction by a State with respect to the responsibility of its nationals for aggression would not have the same negative consequences for international relations or international peace and security as the exercise of national jurisdiction in the same respect. In the event that the proceedings fail to meet the necessary standard of independence and impartiality, the national court proceedings would not preclude a subsequent trial by an international criminal court in accordance with the exception to the principle *non bis in idem* set out in article 12, paragraph 2 (a) (ii). Since the national court jurisdiction for the crime of aggression, as a limited exception to the otherwise exclusive jurisdiction of an international criminal court, is formulated in permissive rather than obligatory terms, there is no corresponding obligation for a State party to establish the jurisdiction of its national courts with respect to this crime under the present article.

Article 9

Obligation to extradite or prosecute

> Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

Commentary

(1) Article 8 of the present Code envisages the establishment of two separate jurisdictional regimes for the crimes set out in articles 17 to 20 in the first instance and for the crime set out in article 16 in the second instance. In the first instance, the national courts of States Parties would be entitled to exercise the broadest possible jurisdiction over genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes under the principle of universal jurisdiction. In addition, an international criminal court would be entitled to exercise concurrent jurisdiction over those crimes in accordance with its statute. In the second instance, an international criminal court would have exclusive jurisdiction over the crime of aggression with the singular exception of the national court jurisdiction of the State which committed aggression. Article 9 addresses the obligation of a State Party to extradite or prosecute an individual alleged to have committed a crime covered by Part II other than aggression in the context of the jurisdictional regime envisaged for those crimes, as indicated by the reference to articles 17 to 20. The present article does not address the transfer of an individual with respect to any crime covered by the Code to an international criminal court under either jurisdictional regime or the extradition of an individual with respect to the crime of aggression to the State which committed aggression under the exception to the second jurisdictional regime, as discussed below.

(2) Article 9 establishes the general principle that any State in whose territory an individual alleged to have committed a crime set out in articles 17 to 20 of Part II is present is bound to extradite or prosecute the alleged offender. The *aut dedere aut judicare* principle is reflected in several of the relevant conventions referred to in the commentary to the previous article. The fundamental purpose of this principle is to ensure that

individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.

(3) The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. 73/ The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of "an individual alleged to have committed a crime". This phrase is used to refer to a person who is singled out, not on the basis of unsubstantiated allegations, but on the basis of pertinent factual information.

(4) The national laws of various States differ concerning the sufficiency of evidence required to initiate a criminal prosecution or to grant a request for extradition. The custodial State would have an obligation to prosecute an alleged offender in its territory when there was sufficient evidence for doing so as a matter of national law unless it decided to grant a request received for extradition. The element of prosecutorial discretion under which an alleged offender may be granted immunity from prosecution in exchange for giving evidence or assisting with the prosecution of another individual whose criminal conduct is considered to be more serious, which is recognized in some legal systems, is precluded with respect to the crimes covered by the present Code. Crimes under international law constitute the most serious crimes that are of concern to the international community as a whole. This is particularly true with respect to the crimes against the peace and security of mankind covered by the present Code. It would be contrary to the interests of

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73/ The 1949 Geneva Conventions on the Protection of War Victims expressly provide for "the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches...." Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; and Geneva Convention IV, article 146.

the international community as a whole to permit a State to confer immunity on an individual who was responsible for a crime under international law such as genocide. The question of considering cooperation with the prosecution as a relevant mitigating factor to be taken into account in determining an appropriate punishment is discussed in the commentary to article 15.

(5) Whereas the sufficiency of evidence required to institute national criminal proceedings is governed by national law, the sufficiency of evidence required to grant an extradition request is addressed in the various bilateral and multilateral treaties. In terms of the sufficiency of evidence required for extradition, the Model Treaty on Extradition (article 5, paragraph 2 (b)) requires as a minimum "a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission". 74/ In this regard, the relevant provision that is common to the 1949 Geneva Conventions on the Protection of War Victims refers to the notion of a *prima facie* case. 75/

(6) The custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial State may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other State or by prosecuting that individual in its national courts. Article 9 does not give priority to either alternative course of action. The custodial State has discretion to decide whether to transfer the individual to another jurisdiction for trial in response to a request received for extradition or to try the alleged offender in its national courts. The custodial State may fulfil its obligation under the first alternative by granting a request received for extradition and thereby transferring to the requesting State the responsibility for the prosecution of the case. However, the custodial State is not required to grant such a request if it prefers to entrust its own authorities with the prosecution of the case. Moreover, the custodial State is not required to give priority to a request for extradition made by a particular State if the custodial State receives a plurality of requests from more than one State. The draft article adopted on first reading recommended

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74/ General Assembly resolution 45/116, Annex.

75/ Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; and Geneva Convention IV, article 146.

that particular consideration should be given to a request from the State in whose territory the crime was committed. The Special Rapporteur proposed on second reading that consideration should be given to including in a specific provision the priority of the request of the territorial State. However, the Drafting Committee considered that this question was not ripe for codification. Thus, the State which has custody of the alleged offender is given the discretion to determine where the case will be prosecuted. The discretion of the custodial State in this respect is consistent with the Model Treaty on Extradition (article 16).

(7) The custodial State may fulfil its obligation under the second alternative by prosecuting the alleged offender in its national courts. Any State Party in whose territory an alleged offender is present is competent to try the case regardless of where the crime occurred or the nationality of the offender or the victim. The physical presence of the alleged offender provides a sufficient basis for the exercise of jurisdiction by the custodial State. This exceptional basis for the exercise of jurisdiction is often referred to as "the principle of universality" or "universal jurisdiction". In the absence of a request for extradition, the custodial State would have no choice but to submit the case to its national authorities for prosecution. This residual obligation is intended to ensure that alleged offenders will be prosecuted by a competent jurisdiction, *i.e.* the custodial State, in the absence of an alternative national or international jurisdiction.

(8) The introductory clause of article 9 recognizes a possible third alternative course of action by the custodial State which would fulfil its obligation to ensure the prosecution of an alleged offender who is found in its territory. The custodial State could transfer the alleged offender to an international criminal court for prosecution. Article 9 does not address the cases in which a custodial State would be permitted or required to take this course of action since this would be determined by the statute of the future court. The present article merely provides that the obligation of a State to prosecute or extradite an individual alleged to have committed a crime set out in articles 17 to 20 of the Code is without prejudice to any right or obligation that such a State may have to transfer such an individual to an international criminal court. For similar reasons, article 9 does not address the transfer of an individual alleged to have committed a crime of aggression to an international criminal court under the separate jurisdictional regime envisaged for this crime in article 8. Moreover, it does not address the

extradition of an individual for the same crime to the State that committed aggression based on the limited exception to the exclusive jurisdiction of an international criminal court for this crime. The exceptional national court jurisdiction for the crime of aggression is formulated in permissive rather than obligatory terms in article 8. It would be for each State Party to decide whether to provide for the jurisdiction of its national courts with respect to this crime and whether to include this crime in its bilateral or multilateral extradition agreements with other States.

(9) The obligation to extradite or prosecute an alleged offender under the present article is further addressed in article 10 and article 8, respectively, with a view to facilitating and ensuring the effective implementation of either option.

Article 10

Extradition of alleged offenders

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. State Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

Commentary

(1) The provisions of articles 8 and 10 are corollaries of those of article 9. The obligation of a State Party to "extradite or prosecute" is formulated in the alternative in article 9 to provide the custodial State with two possible courses of action when it finds an alleged offender in its

territory, namely, (1) to grant a request received from another State to extradite the alleged offender to its territory for trial or (2) to prosecute the alleged offender in its national courts. The custodial State will only have a genuine choice between these two alternatives, assuming that it receives a request for extradition, if it is capable of implementing either course of action. The implementation by the custodial State of the two possible courses of action is therefore addressed in articles 8 and 10.

(2) The provisions of article 10 are intended to enable the custodial State to select and effectively implement the first alternative. They do not, however, indicate a preference for either course of action. The custodial State may fulfil its obligation under the first alternative by granting an extradition request received from another State that is seeking to try the alleged offender for a crime set out in articles 17 to 20 of Part II. The aim of the present article is to ensure that the custodial State will have the necessary legal basis to grant a request for extradition and thereby fulfil its obligation under article 9 in a variety of situations. Paragraph 1 addresses the situation in which there is an extradition treaty in effect between the States concerned which does not cover the crime for which extradition is sought. Paragraph 2 deals with the situation in which, under the law of the requested State, extradition is conditional on the existence of an extradition treaty and there is no such treaty when the extradition request is made. Paragraph 3 addresses the situation where under the law of the concerned States extradition is not conditional on the existence of a treaty. In all of these situations, article 9 provides the custodial State with the necessary legal basis to grant a request for extradition.

(3) Under some treaties and national laws, the custodial State may only grant requests for extradition coming from the State in which the crime occurred. However, several anti-terrorism conventions contain provisions which are designed to secure the possibility for the custodial State, notwithstanding any such restriction, to grant requests for extradition received from certain States which have an obligation to establish their primary jurisdiction over

the relevant offences. [76] The more recent Convention on the Safety of United Nations and Associated Personnel also secures the possibility for the custodial State to grant such a request received from a State that intends to exercise jurisdiction on a permissive basis, for example, the passive personality principle. [77] Paragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State Party to the Code with respect to the crimes covered in Part II. This broader approach is consistent with the general obligation of every State Party to establish its jurisdiction over the crimes set out in articles 17 to 20 in accordance with article 8 and finds further justification in the fact that the present Code does not confer primary jurisdiction on any particular States nor establish an order of priority among extradition requests.

(4) Article 10 substantially reproduces the text of article 15 of the Convention on the Safety of United Nations and Associated Personnel. Similar provisions are also found in a number of other conventions, including the Convention for the Suppression of Unlawful Seizure of Aircraft (article 8), [78] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (article 8), [79] and the International Convention against the Taking of Hostages (article 10). [80]

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[76] The question whether these provisions also extend to States seeking to exercise jurisdiction on a permissive basis has been raised in relation to paragraph 4 of article 10 of the Hostages Convention in the following terms: "This provision was added to the Hague Convention and each of the subsequent anti-terrorism conventions to cover the case of any requirement which may exist in treaties or domestic laws wherein extradition may only be had when the offence was committed in the territory of the requesting State. It may be noted that this fiction relates only to those States which are required to establish primary jurisdiction pursuant to Article 5(1). It would not appear to relate to those States which have established their jurisdiction pursuant to that provision on a permissive basis, i.e., the passive personality principle, and over stateless persons resident in their territory." Joseph J. Lambert, Terrorism and Hostages in International Law - A Commentary on the Hostages Convention 1979, p. 243 (citations omitted).

[77] General Assembly resolution 49/59, annex.

[78] United Nations, Treaty Series, vol. 680, p. 112.

[79] Ibid., vol. 974, p. 177.

[80] General Assembly resolution 34/146, annex.

Article 11

Judicial guarantees

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(a) in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(b) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

(e) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(f) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

Commentary

(1) The 1954 draft Code did not address the procedures to be followed in the investigation and prosecution of alleged perpetrators of the crimes referred to therein. The draft Code was envisaged as an instrument of substantive criminal law to be applied by a national court or possibly an international criminal court in accordance with the rules of procedure and evidence of the competent national or international jurisdiction.

(2) Rules of criminal procedure and evidence are characterized by their complexity and their diversity in various legal systems. The lack of

uniformity of the procedural and evidentiary rules of various domestic jurisdictions is a consequence of the rules having been adopted primarily at the national level to facilitate and regulate the administration of justice by national courts in the context of the legal system of a particular State. In addition, the ad hoc international criminal tribunals have operated under specific rules of procedure and evidence adopted for each of the tribunals. Thus, in the absence of a uniform code of criminal procedure and evidence, the procedural and evidentiary rules that are required to conduct judicial proceedings are tailor-made for the courts of each jurisdiction and vary accordingly. The difficulty of reconciling the different rules for conducting criminal proceedings in the civil law and the common law systems has been encountered by the Commission in elaborating the draft Statute for an international criminal court.

(3) The Commission maintains the position that persons charged with a crime contained in the present Code should be tried in accordance with the rules of procedure and evidence of the competent national or international jurisdiction. Notwithstanding the diversity of procedural and evidentiary rules that govern judicial proceedings in various jurisdictions, every court or tribunal must comply with a minimum standard of due process to ensure the proper administration of justice and respect for the fundamental rights of the accused. There are various national, regional and international standards concerning the administration of justice and the right to a fair trial that must be applied by a particular court or tribunal. The Commission considered it appropriate to ensure that the trial of an individual for a crime covered by the Code would be conducted in accordance with the minimum international standard of due process.

(4) The principle that a person charged with a crime under international law has the right to a fair trial was recognized by the Nürnberg Tribunal after the Second World War. Article 14 of the Nürnberg Charter sets forth certain uniform procedural rules with a view to ensuring a fair trial for every defendant. 81/ The Nürnberg Tribunal confirmed the right of a defendant to receive a fair trial in its judgement which stated as follows: "With regard to the constitution of the Court all that the defendants are entitled to ask is

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81/ Nürnberg Charter, article 14.

to receive a fair trial on the facts and the law." 82/ The Commission recognized the general principle of fair trial in relation to persons charged with crimes under international law in its formulation of the Nürnberg Principles. Principle V states that "Any person charged with a crime under international law has the right to a fair trial on the facts and law." 83/

(5) The principles relating to the treatment to which any person accused of a crime is entitled, and to the procedural conditions under which his guilt or innocence can be objectively established have been recognized and further developed in a number of international and regional instruments adopted after the Second World War, including: the International Covenant on Civil and Political Rights (article 14); 84/ the European Convention for the Protection of Human Rights and Fundamental Freedoms (articles 6 and 7); 85/ the American Convention on Human Rights (articles 5, 7 and 8); 86/ the African Charter of Human and Peoples' Rights (article 7); 87/ the Geneva Conventions of 1949 (article 3, common to the four Conventions); 88/ and Additional Protocols I (article 75) and II (article 6) to the Geneva Conventions. 89/

82/ Nürnberg Judgement, at p. 48.

83/ *Yearbook ... 1950*, vol. II, p. 375.

84/ United Nations, *Treaty Series*, vol. 999, p. 171.

85/ Ibid., vol. 213, p. 221.

86/ Ibid., vol. 1114, p. 123.

87/ *International Legal Materials*, vol. 21, p. 59 [to be published in United Nations, *Treaty Series*, vol. 1520, p. ...]

88/ Geneva Convention I, United Nations, *Treaty Series*, vol. 75, p. 31; Geneva Convention II, ibid., vol. 75, p. 85; Geneva Convention III, ibid., vol. 75, p. 135; Geneva Convention IV, ibid., vol. 75, p. 287.

89/ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Additional Protocol I], June 8, 1977, United Nations, *Treaty Series*, vol. 1125, p. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Additional Protocol II], United Nations, *Treaty Series*, vol. 1125, p. 609.

(6) The Commission considered that an instrument of a universal character, such as the present Code, should require respect for the international standard of due process and fair trial set forth in article 14 of the International Covenant on Civil and Political Rights. The essential provisions of article 14 of the Covenant are therefore reproduced in article 11 to provide for the application of these fundamental judicial guarantees to persons who are tried by a national court or an international court for a crime against the peace and security of mankind contained in the Code. However, some provisions of the Covenant have been omitted or slightly modified for purposes of the present Code, as explained below.

(7) Paragraph 1 indicates the scope of application of the judicial guarantees provided for in article 11. These guarantees are to apply to "An individual charged with a crime against the peace and security of mankind". The provision is framed in non-restrictive terms so as to indicate that it applies irrespective of which competent court or tribunal may be called upon to try an individual for such a crime.

(8) The opening clause of the paragraph also provides that an individual who is accused of a crime covered by the Code is presumed innocent with respect to that accusation. The prosecution has the burden of proving the responsibility of the individual for the crime concerned as a matter of fact and law. If the court is not satisfied that the prosecution has met its burden of proof, then the court must find that the person is not guilty as charged. This presumption of innocence is consistent with article 14, paragraph 2 of the Covenant.

(9) This clause is also intended to ensure that the minimum judicial guarantees listed in article 11 will apply equally to any person who is accused of a crime covered by the Code. Every person charged with a criminal offence is entitled as a human being to the right to a fair trial. The phrase "shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts" confirms the equal protection of the law with respect to the fundamental judicial guarantees that are essential to ensure a fair trial. This phrase is formulated as a non-discrimination clause to emphasize the prohibition of any discrimination. The reference to "the law and the facts" is to be understood as relating to "the applicable law" and "the establishment of the facts". The principle of the equal protection of the law with respect to the right to a fair trial is consistent with article 14, paragraph 3, of the Covenant.

(10) The expression "minimum guarantees" is used in the opening clause of paragraph 1 to indicate the non-exhaustive character of the list of judicial guarantees set forth in paragraph 1 (a) to (h). Thus, a person charged with a crime under the Code may be provided additional guarantees other than those expressly identified. Furthermore, each of the guarantees listed represents the minimum international standard for a fair trial and does not preclude the provision of more extensive protection with respect to the guarantees that are included in the list.

(11) Paragraph 1 (a) sets forth the fundamental right of the accused to a fair and public trial conducted by a court which is competent, independent, impartial and duly established by law. The right to a public trial subjects the proceedings to public scrutiny as a safeguard against any procedural irregularities. The Commission notes, however, that article 14, paragraph 1 of the Covenant permits a court to exclude the public or the press from the proceedings in a limited number of exceptional circumstances. The competence of the court is a prerequisite for its authority to conduct the proceedings and to render a valid judgement in the case. The independence and impartiality of the court is essential to ensure that the merits of the charges against the accused are determined, as a matter of fact and law, in a fair and objective manner. The court must be duly established by law to ensure its legal authority and the proper administration of justice. This provision is drawn from article 14, paragraph 1 of the Covenant.

(12) The text of paragraph 1 (a) adopted on first reading contained a specific reference to a court established "by law or by treaty" to take into account the possibility of a permanent international criminal court being established in the future by means of a treaty. The Commission has deleted the phrase "by treaty" in view of the establishment of two ad hoc international criminal tribunals by means of a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations. The Commission recognized that there were various methods by which an international criminal jurisdiction could be established. The essential requirement for purposes of the judicial guarantees required for a fair trial is that the court be "duly established by law".

(13) Paragraph 1 (b) guarantees the right of the accused to be informed promptly, meaningfully and in sufficient detail of the charges against him. This is the first of a series of rights that are intended to enable the accused to defend against the charges. The accused must be informed promptly

of the charges against him to be able to respond thereto at any preliminary proceeding and to have adequate time to prepare his defence. The accused must be informed of the nature and cause of the charges in a meaningful way so as to be able to fully comprehend the alleged wrongdoing and to respond to the allegations. This requires that the accused be informed of the charges in sufficient detail and in a language that he understands. The provision is drawn from article 14, paragraph 3 (a) of the Covenant.

(14) Paragraph 1 (c) is intended to ensure that the accused will have a sufficient opportunity and the necessary means to effectively exercise the right to defend against the charges. This right will only be meaningful if the accused is guaranteed the time, the facilities, and the legal advice that may be required to prepare and present a defence during the trial. It was emphasized in the Commission that the freedom of the accused to communicate with his counsel would apply equally to defence counsel chosen by the accused or assigned by the court under paragraph 1 (e). The present provision is drawn from article 14, paragraph 3 (b) of the Covenant.

(15) Paragraph 1 (d) guarantees the right of the accused to be tried without undue delay. A person who has been charged but not convicted of a crime should not be deprived of liberty or bear the burden of alleged wrongdoing for an extended period of time as a consequence of any unreasonable delay in the judicial process. The international community as well as the victims of the serious crimes covered by the Code also have a strong interest in ensuring that justice is done without undue delay. This provision is drawn from article 14, paragraph 3 (c) of the Covenant.

(16) Paragraph 1 (e) provides for the right of the accused to be present during the trial and to defend himself against the charges. There is a close relationship between the right of the accused to attend the proceedings and to offer a defence to the charges. The presence of the accused during the proceedings makes it possible for him to view the documentary or other physical evidence, to know the identity of the witnesses for the prosecution and to hear their testimony against him. The accused must be informed of the evidence presented in support of the charges against him in order to be able to defend against those charges. The accused may present his own defence to the court or engage the counsel of his choice to represent him before the court in defending against the charges.

(17) There may be situations in which an accused prefers to be represented by counsel and to receive legal assistance in defending against the charges, but

lacks the necessary means to pay for such assistance. In such a situation, the accused would be entitled to receive the legal assistance of a defence counsel assigned by the court without being required to pay for this assistance. An accused who is not represented by counsel must be informed of the right to assigned counsel and to free legal assistance if he does not have sufficient means to pay for it. This provision is based on article 14, paragraph 3 (d) of the Covenant. The present article does not reproduce the qualifying phrase "in any case where the interests of justice so require" or the related phrase "in any such case" which appear in the Covenant. The Commission considered that the appointment of counsel for the defence, either by the accused or *ex officio* by the court, was necessary in all cases, by reason of the extreme seriousness of the crimes covered by the present Code and the probable severity of the commensurate punishment.

(18) Paragraph 1 (f) seeks to ensure the right of the accused to defend against the charges in relation to the presentation of witness testimony during the trial. It guarantees that the defence will have an opportunity to question the witnesses who testify against the accused. It also guarantees the right of the defence to obtain the attendance of witnesses on behalf of the accused and to question these witnesses under the same conditions as the prosecution with respect to its witnesses. This provision is drawn from article 14, paragraph 3 (e) of the Covenant.

(19) Paragraph 1 (g) seeks to ensure the ability of the accused to understand what takes place during the proceedings by providing for the right to free interpretation if the proceedings are conducted in a language that the accused does not understand or speak. The accused must be able to comprehend the testimony or other evidence presented in support of the charges against him during the trial in order to be able to effectively exercise the right to defend against those charges. Furthermore, the accused has the right to be heard and to free interpretation to enable him to do so if he is unable to speak or understand the language in which the proceedings are being conducted. The right of the accused to the assistance of an interpreter applies not only to the hearing before the trial court, but to all phases of the proceedings. This provision is drawn from article 14, paragraph 3 (f) of the Covenant.

(20) Paragraph 1 (h) prohibits the use of a threat, torture or other means of coercion to force the accused to testify against himself during the proceedings or to obtain a confession. The use of coercive measures to compel an individual to make incriminating statements constitutes a denial of due

process and is contrary to the proper administration of justice. Furthermore, the reliability of any information obtained by such means is highly suspect. This provision is drawn from article 14, paragraph 3 (g) of the Covenant.

(21) Paragraph 2 provides that any individual who is convicted of a crime covered by the Code is entitled to have the conviction and the resulting sentence reviewed according to law. The right of appeal was not envisaged in the present article as adopted on first reading. The Nürnberg Charter did not provide for the right of a defendant to appeal a conviction or sentence to a higher tribunal. The Nürnberg Tribunal was established as the highest court of international criminal jurisdiction to try the major war criminals of the European Axis. 90/ There was no "higher tribunal" competent to review its judgements. The Commission noted the legal developments that had taken place since Nürnberg concerning the recognition of the right of appeal in criminal cases in the Covenant and in the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda established by the Security Council. It was also recalled that the draft Statute for an international criminal court elaborated by the Commission provided for the right of appeal. The Commission considered it appropriate to provide for a right of appeal for persons convicted of a crime covered by the Code, given the serious nature of these crimes and the commensurate severity of the corresponding punishment. The right of appeal extends to both the conviction and the sentence imposed by the court of first instance. This provision is drawn from article 14, paragraph 5 of the Covenant. The reference to a "higher tribunal" contained in the Covenant is not reproduced in the present provision to avoid possible confusion since the appeal may be conducted by a higher court which is part of the same judicial structure comprising a single "tribunal" as in the case of the two ad hoc tribunals established by the Security Council. The essence of the right of appeal is the right of a convicted person to have the adverse judgement and the resulting punishment reviewed by a "higher" judicial body which has the authority as a matter of law to conduct such a review and, where appropriate, to reverse the decision or revise the punishment with binding legal effect. The present provision does not address the hierarchical structure of a particular national or international criminal justice system since a national criminal justice system is governed by the national law of the State concerned and an international

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90/ Nürnberg Charter, article 1.

criminal justice system is governed by the constituent instrument which provided for the establishment of the international tribunal or court.

Article 12

Non bis in idem

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(a) by an international criminal court, if:

(i) the act which was the subject of the judgement in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or

(ii) the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted;

(b) by a national court of another State, if:

(i) the act which was the subject of the previous judgement took place in the territory of that State; or

(ii) that State was the main victim of the crime.

3. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Commentary

(1) Criminal law provides a standard of conduct which the individual must respect bearing in mind the threat of prosecution and punishment for violations of this standard. Just as every State has an interest in effectively enforcing its criminal law by prosecuting and punishing the individuals who are responsible for violations of this law, the international community has an interest in ensuring that the individuals who are responsible for the international crimes covered by the Code are brought to justice and punished.

(2) The concurrent jurisdiction envisaged in article 8 for an international court and the national courts of States parties to the Code with respect to the crimes set out in articles 17 to 20 of Part II gives rise to the possibility that a person could be tried and punished more than once for the same crime. In addition, this possibility is not completely ruled out with respect to the crime of aggression set out in article 16 since the exclusive jurisdiction of an international criminal court envisaged for this crime does not preclude a limited exception for the national courts of the State which committed aggression according to article 8. The possibility of multiple trials conducted in the national courts of different States as well as an international criminal court raises the question of whether the *non bis in idem* principle should be applicable under international law. The Commission recognized that this question involved theoretical and practical issues. In theoretical terms, it was noted that this principle was applicable in internal law and that its implementation in relations between States gave rise to the problem of respect by one State for final judgements pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgement handed down in a foreign State. In practical terms, it was pointed out that a State could provide a shield for an individual who had committed a crime against the peace and security of mankind and who was present in its territory by acquitting him in a sham trial or by convicting and sentencing him to a penalty which was not at all commensurate with the seriousness of the crime, but which would enable him to avoid a conviction or a harsher penalty in another State and, in particular, in the State where the crime was committed or in the State which was the main victim of the crime.

(3) The application of the *non bis in idem* principle under international law is necessary to prevent a person who has been accused of a crime from being prosecuted or punished more than once for the same crime. This fundamental guarantee protects an individual against multiple prosecutions or punishments by a given State for the same crime and is reflected in the International Covenant on Civil and Political Rights (article 14 (7)). A person who has been duly tried and acquitted of criminal charges should not lightly be required to go through the ordeal of a criminal prosecution a second time. In addition, a person who has been duly tried and convicted of a crime should be

subject to a punishment that is commensurate to the crime only once. To impose such a punishment on an individual on more than one occasion for the same crime would exceed the requirements of justice.

(4) The Commission decided to include the *non bis in idem* principle in the present article subject to certain exceptions which were intended to address the various concerns regarding the principle. The Commission has struck an appropriate balance between, on the one hand, the need to preserve to the maximum extent possible the integrity of the *non bis in idem* principle and, on the other hand, the requirements of the proper administration of justice. The Commission noted that the application of this principle at the international level is provided for in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 10) and for Rwanda (article 9). The Commission also recalled that this principle has been included in the draft Statute for an international criminal court (article 42).

(5) Article 12 provides for the application of the *non bis in idem* principle in relation to the crimes covered by the Code in two different situations depending on whether an individual is first prosecuted by an international criminal court or a national court.

(6) Paragraph 1 addresses the situation in which an individual has already been tried for a crime covered by the Code as such by an international criminal court and has been either convicted or acquitted of the crime. In such a case, the *non bis in idem* principle applies fully and without any exception to the decisions of the international criminal court. Thus, an individual who has already been tried by an international court for a crime under the Code could not be tried again for the same crime by any other court, whether national or international. This paragraph is intended to take into account the possible establishment of an international criminal court that would be entrusted with the implementation of the Code. In this context the term "international criminal court" is used to refer to an international court that is competent to prosecute individuals for crimes under the Code and has been established by or with the support of the States parties to the Code or the international community at large, as discussed in the commentary to article 8.

(7) The phrase "finally convicted or acquitted" is used in paragraphs 1 and 2 to indicate that the *non bis in idem* principle would apply only to a final decision on the merits of the charges against an accused which was not subject

to further appeal or review. In particular, the word "acquitted" is used to refer to an acquittal as a result of a judgement on the merits, not as a result of a discharge of proceedings.

(8) Paragraph 2 addresses the situation in which an individual has already been tried for a crime by a national court and has been either convicted or acquitted of the crime by that court. It provides that an individual may not be tried for a crime under the Code arising out of the same act (or omission) that was the subject of the previous criminal proceedings before the national court. While paragraph 1 of article 12 does not recognize any exceptions to the *non bis in idem* principle with respect to the judgement of an international criminal court, paragraph 2 of the same article does not require as strict an application of this principle with respect to the judgements of national courts. Paragraph 2 affirms this principle with respect to national court judgements while at the same time envisaging certain limited exceptions set forth in subparagraphs (a) and (b).

(9) Paragraph 2 provides for the application of the *non bis in idem* principle to a final decision of a national court on the merits of the case which is not subject to further appeal or review. The application of this principle with respect to a final conviction does not require the imposition of a commensurate punishment or the complete or partial enforcement of such a punishment. The failure to impose a punishment that is proportional to the crime or to take steps to enforce a punishment may indicate an element of fraud in the administration of justice. The Commission decided to preserve the *non bis in idem* principle in the present paragraph to the maximum extent possible and to address the possibility of the fraudulent administration of justice under the exception to the principle provided for in subparagraph 2 (a) (ii).

(10) Subparagraph 2 (a) recognizes two exceptional cases in which an individual could be tried by an international criminal court for a crime under the Code notwithstanding the prior decision of a national court. First, an individual may be tried by an international criminal court for a crime against the peace and security of mankind arising out of the same act that was the subject of the previous national court proceedings if the individual was tried by a national court for an "ordinary" crime rather than one of the more serious crimes under the Code. In such a case, the individual has not been tried or punished for the same crime but for a "lesser crime" that does not encompass the full extent of his criminal conduct. Thus, an individual could

be tried by a national court for murder and tried a second time by an international criminal court for the crime of genocide based on the same act under subparagraph 2 (a) (i).

(11) Second, an individual could be tried by an international criminal court for a crime set out in the Code arising out of the same act or even for the same crime that was the subject of the previous national court decision if "the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted". In such a case, the individual has not been duly tried or punished for the same act or the same crime because of the abuse of power or improper administration of justice by the national authorities in prosecuting the case or conducting the proceedings. The international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process. It is important to note that these exceptions only permit subsequent proceedings by an international criminal court. Subparagraph 2 (a) (ii) is similar to the corresponding provisions contained in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 10 (2)) and for Rwanda (article 9 (2)).

(12) Subparagraph 2 (b) recognizes two exceptional cases in which an individual could be tried by a national court for a crime under the Code notwithstanding the prior decision of a national court of another State. These two exceptions recognize that although any State party to the Code would be competent to prosecute an alleged offender, there are two categories of States which have a particular interest in ensuring the effective prosecution and punishment of the offenders. First, the State in the territory of which the crime was committed has a strong interest in the effective prosecution and punishment of the responsible individuals because the crime occurred within its territorial jurisdiction. The territorial State is more directly affected by the crime in this respect than other States. Second, the State which was the primary target of the crime, the nationals of which were the primary victims of the crime or the interests of which were directly and significantly affected also has a strong interest in the effective prosecution and punishment of the responsible individuals. The State which is the "main victim" of the crime has incurred a greater and more direct injury as a result of the crime as compared to other States. Subparagraphs 2 (b) (i) and (ii) provide that the territorial State or the State which was the victim

or whose nationals were the victims may institute criminal proceedings against an individual for a crime set out in the Code even though that individual has already been tried by the national court of another State for the same crime. Either State has the option of instituting subsequent proceedings if, for example, it considers that the previous decision did not correspond to a proper appraisal of the acts or their seriousness. Neither State is under an obligation to do so if it is satisfied that justice has already been done.

(13) Paragraph 3 requires a court that convicts an individual of a crime under the Code in a subsequent proceeding to take into account in imposing an appropriate penalty the extent to which any penalty has already been imposed and enforced against the individual for the same crime or the same act as a result of a previous trial. There are two ways in which the court could take into account the extent of enforcement of the previous penalty. First, the court could impose a penalty that is fully commensurate to the crime set out in the Code for which the individual has been convicted in the subsequent proceeding and further indicate the extent to which this penalty is to be implemented in the light of the punishment that has already been enforced. Second, the court could determine the penalty that would be commensurate to the crime and impose a lesser penalty to reflect the previous punishment. Under the second approach the court could still indicate the fully commensurate penalty to demonstrate that justice had been done and to seek a degree of uniformity in punishing persons convicted of crimes covered by the Code. This paragraph is equally applicable in the event of a subsequent conviction by a national court or an international criminal court. It is similar to the corresponding provisions contained in the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 10 (3)) and for Rwanda (article 9 (3)).

Article 13

Non-retroactivity

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

Commentary

(1) The fundamental purpose of criminal law is to prohibit, to punish and to deter conduct which is considered to be of a sufficiently serious nature to justify the characterization of an act or omission as a crime. This law provides a standard of conduct to guide the subsequent behaviour of individuals. It would clearly be unreasonable to determine the lawfulness of the conduct of an individual based on a standard that was not in existence at the time the individual decided to pursue a particular course of action or to refrain from taking any action. The prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust. The prohibition of the retroactive application of criminal law is reflected in the principle *nullum crimen sine lege*. This principle has been embodied in a number of international instruments, such as the Universal Declaration of Human Rights (article 11 (2)), the International Covenant on Civil and Political Rights (article 15 1)), the European Convention on Human Rights (article 7 (1)), the American Convention on Human Rights (article 9) and the African Charter on Human and Peoples' Rights (article 7 (2)).

(2) The principle of the non-retroactivity of criminal law is recognized with respect to the present Code in article 13. This principle would be violated if the Code were to be applied to crimes committed before its entry into force. Paragraph 1 is intended to avoid any violation of the principle by limiting the application of the Code to acts committed after its entry into force. It would therefore not be permissible to try and possibly convict an individual for a crime "under the present Code" as a consequence of an act committed "before its entry into force".

(3) The present paragraph applies only to criminal proceedings instituted against an individual for an act as a crime "under the present Code". It does not preclude the institution of such proceedings against an individual for an act committed before the entry into force of the Code on a different legal basis. For example, a person who committed an act of genocide before the Code entered into force could not be prosecuted for a crime against the peace and security of mankind under that instrument. This individual could, however, be subject to criminal proceedings for the same act on a separate and distinct legal basis. Such an individual could be tried and punished for the crime of genocide under international law (Genocide Convention, customary law or national law) or the crime of murder under national law. The possibility of

instituting criminal proceedings for an act committed before the entry into force of the Code on independent legal grounds provided by international law or national law is addressed in paragraph 2.

(4) The principle of non-retroactivity, as outlined in this article, applies also to the imposition of a penalty which is heavier than the one that was applicable at the time when the criminal offence was committed.

(5) In formulating paragraph 2 of article 13, the Commission was guided by two considerations. On the one hand, it did not want the principle of non-retroactivity set out in the present Code to prejudice the possibility of prosecution, in the case of acts committed before the entry into force of the Code, on different legal grounds, for example a pre-existing convention to which a State was a party, or again, under customary international law. Hence the provision contained in paragraph 2. On the other hand, the Commission did not want this wider possibility to be used with such flexibility that it might give rise to prosecution on legal grounds that are too vague. For this reason, it preferred to use in paragraph 2 the expression "in accordance with international law" rather than less concrete expressions such as "in accordance with the general principles of international law".

(6) Paragraph 2 also envisages the possibility of the prosecution of an individual for a crime under pre-existing national law. However, the term "national law" should be understood as referring to the application of national law in conformity with international law.

Article 14

Defences

> The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Commentary

(1) The present article entrusts the competent court with the determination of the question of the admissibility of any defence which may be raised by an accused in a particular case with respect to a crime against the peace and security of mankind. It provides for the competent court to perform this task in accordance with "general principles of law" and having regard to the character of each crime.

(2) The title of the article is "defences". Different legal systems classify in different ways the range of possible responses that an accused can make to

an accusation of crime. In some national legal systems a distinction is drawn between justifications (faits justicatifs) and excuses (faits excusatoires). Thus self-defence is a justification, eliminating in all respects the criminal character of the act in question. By comparison duress, if admitted in relation to a particular crime, is merely an excuse which may exculpate a particular accused. Other legal systems do not make such a systematic distinction, using the general description "defence" to cover both justifications and excuses. Article 14 is intended to cover all such pleas.

(3) The competent court is required to consider two criteria in making the determination required by article 14. First, the court must consider the validity of the defence raised by the accused under general principles of law. This first criterion limits the possible defences to crimes covered by the Code to those defences that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law. Second, the court must consider the applicability of the defence to the crime covered by the Code with which an accused is charged in a particular case in the light of the character of that crime.

(4) The Nürnberg Charter did not recognize any defences to crimes against peace, war crimes or crimes against humanity. The Nürnberg Tribunal acquitted some defendants based on its conclusion that there was insufficient evidence to establish with the necessary degree of certitude that these individuals were guilty of the crimes with which they were charged. 91/ This relates to onus of proof, not to defences in the sense explained in paragraph (2) above.

(5) Since Nürnberg the international community has adopted a number of relevant conventions which also do not recognize any defences to crimes. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide reaffirmed the principle of individual criminal responsibility for the crime of genocide without recognizing any possible defences to this crime. The 1949 Geneva Conventions and the more recent 1977 Additional Protocol I thereto recognized the principle of individual criminal responsibility for grave breaches of the Conventions and the Protocol without recognizing any

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91/ For example, the Nürnberg Tribunal found the defendant Schacht not guilty as charged because the evidence provided by the prosecution with respect to the elements of the definition of the crime concerned was not sufficient to establish his guilt beyond a reasonable doubt. Nürnberg Judgement, p. 137.

defences to those grave breaches. The 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* recognized the principle of individual criminal responsibility for the crime of apartheid without recognizing any defences to this crime.

(6) The United Nations War Crimes Commission compiled the judicial decisions of almost 2,000 war crime trials conducted by nine countries at the end of the Second World War as well as the relevant legislation adopted by a number of countries, and drew certain conclusions with respect to the admissibility of defences or extenuating circumstances with respect to crimes under international law. 92/ It would be for the competent court to decide whether the facts involved in a particular case constituted a defence under the present article or extenuating circumstances under article 15 in the light of the jurisprudence of the Second World War as well as subsequent legal developments.

(7) A classic defence to a crime is self-defence. It is important to distinguish between the notion of self-defence in the context of criminal law and the notion of self-defence in the context of Article 51 of the Charter of the United Nations. The notion of self-defence in the criminal law context relieves an individual of responsibility for a violent act committed against another human being that would otherwise constitute a crime such as murder. In contrast, the notion of self-defence in the context of the Charter of the United Nations refers to the lawful use of force by a State in the exercise of the inherent right of individual or collective self-defence, and which would therefore not constitute aggression by that State. Since aggression by a State is a *sine qua non* for individual responsibility for a crime of aggression under article 16, an individual could not be held responsible for such a crime in the absence of the necessary corresponding action by a State, as discussed in the commentary to article 16.

(8) Self-defence was recognized as a possible defence in some of the war crime trials conducted after the Second World War. The United Nations War Crimes Commission concluded that "A plea of self-defence may be successfully put forward, in suitable circumstances, in war crime trials as in trials held

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92/ See Law Reports ..., vol. XV, p. 155.

under municipal law." 93/ The plea of self-defence may be raised by an accused who is charged with a crime of violence committed against another human being resulting in death or serious bodily injury. The notion of self-defence could relieve an accused of criminal responsibility for the use of force against another human being resulting in death or serious injury if this use of force was necessary to avoid an immediate threat of his own death or serious injury caused by that other human being. The right of an individual to act in self-defence is implicitly recognized in the saving clause contained in the Convention on the Safety of United Nations and Associated Personnel (article 21). 94/

(9) An issue often discussed in the context of defences to crimes under international law is that of "superior orders". Article 5 of these articles makes it clear that superior orders do not constitute a defence; article 7, similarly, precludes an accused from relying on his or her official position by way of defence. Superior orders may, however, sometimes be relevant in relation to the separate issue of duress or coercion.

(10) Duress or coercion was recognized as a possible defence or extenuating circumstance in some of the war crime trials conducted after the Second World War. 95/ The United Nations War Crimes Commission concluded that duress generally required three essential elements, namely: "(a) the act

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93/ Law Reports ..., vol. XV, p. 177. The Judge Advocate acting in the trial of Willi Tessman and others before the British Military Court in Germany in 1947 described the general requirements for a valid claim of self-defence: "The law permits a man to save his own life by despatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant; and, of course, such considerations as the nature of the weapon in the hands of the accused, the question whether the assailant had any weapon and so forth, have to be considered. In other words, was it a last resort? Had he retreated to the uttermost before ending the life of another human being?" Id.

94/ General Assembly resolution 49/59, annex. See M.-Christiane Bourloyannis-Vrailas, The Convention on the Safety of United Nations and Associated Personnel, International and Comparative Law Quarterly, vol. 44, pp. 560, 586-87.

95/ The United States Military Tribunal which conducted the Einsatzgruppen Trial stated as follows: "Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever". Law Reports, vol. XV, p. 174.

charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was not disproportionate to the evil." 96/ Although superior orders *per se* was excluded as a defence by the Nürnberg Charter and judgement, the existence of such orders could be a relevant factor in determining the existence of the necessary conditions for a valid plea of duress. In this regard, the Nürnberg Tribunal stated: "That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible." 97/ Clearly an individual who was responsible in some measure for the existence or the execution of an order or whose participation exceeded the requirements thereof could not claim to have been deprived of a moral choice as to his course of conduct. 98/ The plea of duress may be raised by an accused who is charged with various types of criminal conduct. There are different views as to whether even the most extreme duress can ever constitute a valid defence or extenuating circumstance with respect to a particularly heinous crime, such as killing an innocent human being. This question requires consideration of whether an individual can ever be justified in taking the life of one human being in order to save another human being or, in other words, whether the

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96/ Law Reports ..., vol. XV, p. 174.

97/ Nürnberg Judgement, pp. 53-54.

98/ The United States Military Tribunal which conducted the trial in the I.G. Farben Case discussed the relevance of superior orders in determining the validity of a "defence of necessity" as follows: "From a consideration of the IMT, Flick, and Roechling judgements, we deduce that an order of a superior officer or a law or governmental decree will not justify the defence of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative." Trials of War Criminals Before the Nürnberg Military Tribunals, vol. VIII, p. 1179. The United Nations War Crimes Commission characterized the plea considered in that case as one of coercion or duress, rather than necessity, based on the alleged facts considered by the court. Law Reports, vol. XV, pp. 155-157 and 170-171.

remedy of saving a human being is inherently disproportionate to the evil of killing another human being under the third element. 99/ Duress which does not constitute a valid defence that relieves an individual of all responsibility for criminal conduct may none the less constitute an extenuating circumstance resulting in the imposition of a lesser punishment.

(11) Military necessity, was recognized as a possible defence or extenuating circumstance in very limited situations in some of the war crime trials conducted after the Second World War. The United States Military Tribunal which conducted the *High Command Trial* rejected the doctrine of military necessity as a general defence to war crimes 100/ and as a defence to certain types of war crimes, such as "the compulsory recruitment of labour from an occupied territory ... for use in military operations". However, the Tribunal recognized a plea of military necessity as a defence in relation to charges of spoliation because the prohibition of this type of devastation was formulated in terms of conduct that was not justified by military necessity. 101/ Similarly, the United States Military Tribunal which

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99/ For example, the Judge Advocate acting in the trial of Robert Holzer and others before a Canadian Military Court in Germany in 1946 stated that: "There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified." Law Reports, vol. XV, p. 173. The Judge Advocate acting in the trial of Valentin Fuerstein and others before a British Military Court in Germany in 1948 also expressed the view that coercion or duress could not justify killing another human being. Id.

100/ "We content ourselves on this subject [the doctrine of military necessity] with stating that such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations." Law Reports, vol. XII, p. 93.

101/ The United States Military Tribunal discussed the plea of military necessity in relation to the charge of spoliation as follows: "The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge." Law Reports, vol. XII, pp. 93-94.

conducted the *Hostages Trial* rejected military necessity as a defence in relation to rules of international law which did not explicitly recognize any such exception. 102/ In contrast, the Tribunal acquitted the defendant Rendulic of charges of wanton destruction of private and public property under the military necessity exception which was expressly provided for in the relevant Hague Regulation. 103/ The United Nations War Crimes Commission concluded that the plea of military necessity was more often rejected than accepted as a defence or an extenuating circumstance with the notable exceptions of the *High Command Trial* and the *Hostages Trial*. 104/

(12) A mistake of fact was also recognized as a possible defence or extenuating circumstance in some of the war crime trials conducted after the Second World War. The United Nations War Crimes Commission concluded that "A mistake of fact, however, may constitute a defence in war crime trials just as it may in trials before municipal courts." 105/ A plea of mistake of fact requires a material fact which relates to an element of the crime. In

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102/ "Military necessity or expediency do not justify a violation of positive rules. International Law is prohibitive law. Articles 46, 47 and 50 of the Hague Regulations of 1907 make no such exceptions to its enforcement. The rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise." Law Reports, vol. VIII, p. 66-67.

103/ "The Hague Regulations prohibited 'The destruction or seizure of enemy property except in cases where this destruction or seizure is urgently required by the necessities of war.' Article 23 (g). The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destructions of public and private property by retreating military forces which would give aid and comfort to the enemy, may constitute a situation coming within the exceptions contained in article 23 (g)." Law Reports, vol. VIII, p. 69.

104/ Law Reports, vol. XV, p. 176.

105/ Law Reports, vol. XV, p. 184.

addition, a mistake of fact must be the result of a reasonable and honest error of judgement rather than ignoring obvious facts. 106/

(13) There is no indication that there is a minimum age requirement for individual criminal responsibility under international law. None the less the competent court may have to decide whether the youth of the accused at the time the alleged crime occurred should be considered to constitute a defence or extenuating circumstance in a particular case. 107/ The United Nations War Crimes Commission did not conduct an exhaustive analysis of the ages of the persons convicted in the war crime trials conducted after the Second World War, but noted that persons as young as 15 years of age were convicted and punished in some of the these trials. 108/

106/ The United States Military Tribunal which conducted the Hostages Trial recognized mistake of fact as a possible exculpatory factor in the following circumstances: "In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgement, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence." Law Reports, vol. XV, p. 184.

107/ The general principle of a minimum age requirement for criminal responsibility was recognized in Rule 4.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). General Assembly resolution 40/33, annex. The Beijing Rules did not, however, establish an international standard for the age of criminal responsibility. Moreover, the definition of a juvenile for purposes of excluding the application of criminal law varies greatly in different legal systems, ranging from 7 years to 18 years or above. The commentary to Rule 4.1 suggests that the current trend is to consider "whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour". Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice, p. 172.

108/ Law Reports, vol. XV, p. 185.

Article 15

Extenuating circumstances

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

Commentary

(1) The general principle of the liability of an individual to punishment for a crime covered by the present Code is set forth in article 3. The competent court which convicts an individual of such a crime is entrusted with the task of determining an appropriate punishment for that crime in accordance with the relevant provisions of its applicable substantive and procedural law. In this regard, the court is required to take into account the character and gravity of the crime in considering the punishment to be imposed in accordance with article 3.

(2) Whereas article 3 is intended to ensure that the punishment contemplated by the court is commensurate with the crime, article 15 is intended to ensure that the court considers any relevant extenuating circumstances or mitigating factors before taking a decision on the question of punishment. The interests of justice are not served by imposing an excessive punishment which is disproportionate to the character of the crime or the degree of culpability of the convicted person or which fails to take into account any extenuating circumstances that lessen the degree of culpability or otherwise justify a less severe punishment.

(3) The competent court must engage in a two-step process in considering whether it is *appropriate* to impose a less severe punishment on a convicted person as a consequence of extenuating circumstances. First, the court must determine the admissibility of the extenuating circumstance raised by the accused under general principles of law. This criterion limits the possible extenuating circumstances for crimes covered by the Code to those circumstances that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law. Second, the court must determine whether there is sufficient evidence of the extenuating circumstance in a particular case.

(4) The extenuating circumstances to be taken into account by the court vary depending on the facts of a particular case. The court is to be guided by general principles of law in determining the extenuating circumstances which may merit consideration in a particular case. These circumstances pertain to

general categories of factors which are well-established and widely recognized as lessening the degree of culpability of an individual or otherwise justifying a reduction in punishment. For example, the court may take into account any effort made by the convicted person to alleviate the suffering of the victim or to limit the number of victims, any less significant form of criminal participation of the convicted person in relation to other responsible individuals or any refusal to abuse a position of governmental or military authority to pursue the criminal policies. The Nürnberg Tribunal considered such mitigating factors in deciding to impose prison sentences rather than the death penalty on some convicted persons. 109/ The extensive jurisprudence of the military tribunals and the national courts which conducted the subsequent war crime trials after the trial of the major war criminals by the Nürnberg Tribunal at the end of the Second World War could provide some guidance to the competent court in determining the general principles which govern the question of the admissibility of defences or extenuating circumstances with respect to the crimes covered by the Code under articles 14 and 15 respectively, as discussed in the commentary to article 14. In this regard, the United Nations War Crimes Commission noted that in the subsequent war crime trials conducted after the Second World War some convicted persons entered pleas for mitigation of sentence based on their age, experience and family responsibilities. 110/ Moreover, the fact that the accused provided substantial cooperation in the prosecution of other individuals for similar crimes could also constitute a mitigating factor, as provided for in the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia (Rule 101) 111/ and Rwanda (Rule 101). 112/

109/ Nürnberg Judgement, pp. 134, 158-159 and 161.

110/ Law Reports ..., vol. XV, p. 187.

111/ United Nations document IT/32/Rev.8, p. 62.

112/ United Nations document ITR/3/Rev.1, p. 91.

PART II. CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 16

Crime of aggression

> An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

Commentary

(1) The characterization of aggression as a crime against the peace and security of mankind contained in article 16 of the present Code is drawn from the relevant provision of the Nürnberg Charter as interpreted and applied by the Nürnberg Tribunal. Article 16 addresses several important aspects of the crime of aggression for the purpose of individual criminal responsibility. The phrase "An individual ... shall be responsible for a crime of aggression" is used to indicate that the scope of the present article is limited to the crime of aggression for the purpose of individual criminal responsibility. Thus, the present article does not address the question of the definition of aggression by a State which is beyond the scope of the present Code.

(2) The perpetrators of an act of aggression are to be found only in the categories of individuals who have the necessary authority or power to be in a position potentially to play a decisive role in committing aggression. These are the individuals whom article 16 designates as "leaders" or "organizers", an expression that was taken from the Nürnberg Charter. These terms must be understood in the broad sense, i.e. as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nürnberg Tribunal, which stated that: "Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen". 113/

(3) The mere material fact of participating in an act of aggression is, however, not enough to establish the guilt of a leader or organizer. Such participation must have been intentional and have taken place knowingly as part of a plan or policy of aggression. In this connection, the Nürnberg Tribunal stated, in analysing the conduct of some of the accused, that: "When they, with knowledge of his aims, gave him their cooperation,

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113/ Nürnberg Judgement, p. 55.

they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing". 114/

(4) The present article refers to "aggression committed by a State". An individual, as leader or organizer, participates in that aggression. It is this participation that article 16 defines as a crime against the peace and security of mankind. In other words, it reaffirms the criminal responsibility of the participants in a crime of aggression. Individual responsibility for such a crime is intrinsically and inextricably linked to the commission of aggression by a State. The rule of international law which prohibits aggression applies to the conduct of a State in relation to another State. Therefore, only a State is capable of committing aggression by violating this rule of international law which prohibits such conduct. At the same time, a State is an abstract entity which is incapable of acting on its own. A State can commit aggression only with the active participation of the individuals who have the necessary authority or power to plan, prepare, initiate or wage aggression. The Nürnberg Tribunal clearly recognized the reality of the role of States and individuals in stating that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced". Thus, the violation by a State of the rule of international law

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114/ However, the Tribunal found Schacht, Doenitz and Bormann innocent of certain charges of crimes against peace, stating that: "It is clear that Schacht was a central figure in Germany's rearmament programme and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a crime against peace under article 6 of the Charter, it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars". With regard to the second defendant, the Tribunal stated: "Although Doenitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced and there is no evidence that he was informed about the decisions reached there". As to the third defendant, the Tribunal suggested the possibility of inferring knowledge by virtue of a person's position: "The evidence does not show that Bormann knew of Hitler's plans to prepare, initiate or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece those plans for aggression. Nor can knowledge be inferred from the positions he held". Ibid, pp. 135, 137 and 164.

prohibiting aggression gives rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression. The words "aggression committed by a State" clearly indicate that such a violation of the law by a State is a *sine qua non* condition for the possible attribution to an individual of responsibility for a crime of aggression. None the less, the scope of the present article is limited to participation in a crime of aggression for the purpose of individual criminal responsibility. It therefore does not relate to the rule of international law which prohibits aggression by a State.

(5) The action of a State entails individual responsibility for a crime of aggression only if the conduct of the State is a sufficiently serious violation of the prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations. In this regard, the competent court may have to consider two closely related issues, namely, whether the conduct of the State constitutes a violation of Article 2, paragraph 4, of the Charter and whether such conduct constitutes a sufficiently serious violation of an international obligation to qualify as aggression entailing individual criminal responsibility. The Charter and Judgement of the Nürnberg Tribunal are the main sources of authority with regard to individual criminal responsibility for acts of aggression.

(6) Several phases of aggression are listed in article 16. These are: the order to commit aggression, and, subsequently, the planning, preparation, initiation and waging of the resulting operations. These different phases are not watertight. Participation in a single phase of aggression is enough to give rise to criminal responsibility.

Article 17

Crime of genocide

A crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

Commentary

(1) The Nürnberg Charter recognized in article 6 (c) two distinct categories of crimes against humanity. The first category of crimes against humanity relating to inhumane acts is addressed in article 18. The second category of crimes against humanity relating to persecution is addressed in the present article in the light of the further development of the law concerning such crimes since Nürnberg.

(2) The Nürnberg Charter defined the second category of crimes against humanity as "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal". The Nürnberg Tribunal convicted some of the defendants of crimes against humanity based on this type of conduct and, thus, confirmed the principle of individual responsibility and punishment for such conduct as a crime under international law. 115/ Shortly after the judgement of the Nürnberg Tribunal, the General Assembly affirmed that the persecution type of crimes against humanity or "genocide" 116/ constituted a crime under international law for which individuals were subject to punishment. 117/ The General Assembly subsequently recognized that genocide had inflicted great losses on humanity throughout history in adopting the Convention on the Prevention and Punishment of the Crime of Genocide to provide a basis for the international cooperation required to liberate mankind from this odious scourge. 118/

(3) The fact that the General Assembly had recognized the extreme gravity of the crime of genocide as early as 1946 and had drafted an international convention on its prevention and punishment as early as 1948 made it essential

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115/ Nürnberg Judgement, pp. 84, 129-131 and 144-146.

116/ The term "genocide" was first coined by Raphael Lemkin. See R. Lemkin, Axis Rule in Occupied Europe, Carnegie Endowment for International Peace (Washington 1944), pp. 79-95.

117/ General Assembly resolution 96 (I).

118/ General Assembly resolution 260 A (III); United Nations, Treaty Series, vol. 78, p. 277.

to include this crime in the present Code and also facilitated the Commission's task. The Convention has been widely accepted by the international community and ratified by the overwhelming majority of States. Moreover, the principles underlying the Convention have been recognized by the International Court of Justice as binding on States even without any conventional obligation. 119/ Article II of the Convention contains a definition of the crime of genocide which represents an important further development in the law relating to the persecution category of crimes against humanity recognized in the Nürnberg Charter. It provides a precise definition of the crime of genocide in terms of the necessary intent and the prohibited acts. The Convention also confirms in article I that genocide is a crime under international law which may be committed in time of peace or in time of war. Thus, the Convention does not include the requirement of a nexus to crimes against peace or war crimes contained in the Nürnberg Charter which referred to "persecutions ... in execution of or in connection with any crime within the jurisdiction of the Tribunal". The definition of genocide contained in article II of the Convention, which is widely accepted and generally recognized as the authoritative definition of this crime, is reproduced in article 17 of the present Code. The same provision of the Convention is also reproduced in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Indeed the tragic events in Rwanda clearly demonstrated that the crime of genocide, even when committed primarily in the territory of a single State, could have serious consequences for international peace and security and, thus, confirmed the appropriateness of including this crime in the present Code.

(4) The definition of the crime of genocide set forth in article 17 consists of two important elements, namely the requisite intent (*mens rea*) and the prohibited act (*actus reus*). These two elements are specifically referred to in the initial phrase of article 17 which states that "A crime of genocide means any of the following acts committed with intent to ....". Whereas the first element of the definition is addressed in the opening clause of article 17, the second element is addressed in subparagraphs (a) to (e).

(5) As regards the first element, the definition of the crime of genocide requires a specific intent which is the distinguishing characteristic of this

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119/ Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 12.

particular crime under international law. The prohibited acts enumerated in subparagraphs (a) to (e) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act. As indicated in the opening clause of article 17, an individual incurs responsibility for the crime of genocide only when one of the prohibited acts is "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such".

(6) There are several important aspects of the intent required for the crime of genocide. First, the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct. 120/ The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group.

(7) Second, the intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group. In this regard, the General Assembly distinguished between the crimes of genocide and homicide in describing

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120/ "The main characteristic of Genocide is its object: the act must be directed toward the destruction of a group. Groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not per se but only as members of the group to which they belong." Nehemiah Robinson, The Genocide Convention: A Commentary (1960) p. 58.

genocide as the "denial of the right of existence of entire human groups" and homicide as the "denial of the right to live of individual human beings" in resolution 96 (I).

(8) Third, the intention must be to destroy a group "in whole or in part". It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.

(9) Fourth, the intention must be to destroy one of the types of groups covered by the Convention, namely, a national, ethnic, racial or religious group. Political groups were included in the definition of persecution contained in the Nürnberg Charter, but not in the definition of genocide contained in the Convention because this type of group was not considered to be sufficiently stable for purposes of the latter crime. None the less persecution directed against members of a political group could still constitute a crime against humanity as set forth in article 18, subparagraph (e). Racial and religious groups are covered by the Nürnberg Charter and the Convention. In addition, the Convention also covers national or ethnical groups. Article 17 recognizes the same categories of protected groups as the Convention. The word "ethnical" used in the Convention has been replaced by the word "ethnic" in article 17 to reflect modern English usage without in any way affecting the substance of the provision. Furthermore, the Commission was of the view that the present article covered the prohibited acts when committed with the necessary intent against members of a tribal group.

(10) As recognized in the commentary to article 5, the crimes covered by the Code are of such magnitude that they often require some type of involvement on the part of high level government officials or military commanders as well as their subordinates. Indeed the Convention explicitly recognizes in article IV that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals. The definition of the crime of genocide would be equally applicable to any individual who committed one of the prohibited acts with the necessary intent. The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the

crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the destructive effect of this criminal conduct on the group itself. Thus, the necessary degree of knowledge and intent may be inferred from the nature of the order to commit the prohibited acts of destruction against individuals who belong to a particular group and are therefore singled out as the immediate victims of the massive criminal conduct.

(11) With regard to the second element of the definition of genocide, the present article sets forth in subparagraphs (a) to (e) the prohibited acts which are contained in article II of the Convention. Whereas the 1954 draft Code used the word "including" in article 2, paragraph (10) to indicate an illustrative rather than an exhaustive list of acts constituting genocide, the Commission decided to use the wording of article II of the Convention to indicate that the list of prohibited acts contained in article 17 is exhaustive in nature. The Commission decided in favour of that solution having regard to the need to conform with a text widely accepted by the international community.

(12) As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be

taken only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the Ad Hoc Committee on Genocide contained provisions on "cultural genocide" covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of "cultural genocide" contained in the two drafts and simply listed acts which come within the category of "physical" or "biological" genocide. 121/ The first three subparagraphs of the present article list acts of "physical genocide", while the last two list acts of "biological genocide".

(13) As regards subparagraph (a), the phrase "killing members of the group" was drawn from article II, subparagraph (a) of the Convention. 122/

(14) With regard to subparagraph (b), the phrase "causing serious bodily or mental harm to members of the group" was drawn from article II, subparagraph (b) of the Convention. This subparagraph covers two types of harm that may be inflicted on an individual, namely, bodily harm which involves some type of physical injury and mental harm which involves some type of impairment of mental faculties. The bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.

(15) Regarding subparagraph (c), the phrase "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" was drawn from article II, subparagraph (c) of the

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121/ None the less some of the acts referred to in this paragraph could constitute a crime against the peace and security of mankind in certain circumstances, for example, a crime against humanity under article 18, paragraph (e) or (f) or a war crime under article 19, paragraph (c) (iv).

122/ "The act of 'killing' (subparagraph (a)) is broader than 'murder'; and it was selected to correspond to the French word 'meurtre,' which implies more than 'assassinat'; otherwise it is hardly open to various interpretations." Nehemiah Robinson, The Genocide Convention: A Commentary (1960) p. 63.

Convention. 123/ It was suggested that deportation should be included in subparagraph (c). The Commission, however, considered that this subparagraph covered deportation when carried out with the intent to destroy the group in whole or in part.

(16) As regards subparagraph (d), the phrase "imposing measures intended to prevent births within the group" was drawn from article II, subparagraph (d) of the Convention. 124/ The phrase "imposing measures" is used in this subparagraph to indicate the necessity of an element of coercion. 125/ Therefore this provision would not apply to voluntary birth control programmes sponsored by a State as a matter of social policy.

(17) With regard to subparagraph (e), the phrase "forcibly transferring children of the group to another group", was drawn from article II, subparagraph (e) of the Convention. The forcible transfer of children would have particularly serious consequences for the future viability of a group as such. Although the present article does not extend to the transfer of adults, this type of conduct in certain circumstances could constitute a crime against humanity under article 18, subparagraph (g) or a war crime under article 20,

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123/ "The word 'deliberately' was included there to denote a precise intention of the destruction, i.e., the premeditation related to the creation of certain conditions of life ... It is impossible to enumerate in advance the 'conditions of life' that would come within the prohibition of Article II; the intent and probability of the final aim alone can determine in each separate case whether an act of Genocide has been committed (or attempted) or not. Instances of Genocide that could come under subparagraph (c) are such as placing a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accommodations, etc., provided that these restrictions are imposed with intent to destroy the group in whole or in part." Nehemiah Robinson, The Genocide Convention: A Commentary (1960) pp. 60 and 63-64.

124/ "The measure imposed need not be the classic action of sterilization; separation of the sexes, prohibition of marriages and the like are measures equally restrictive and produce the same results." Nehemiah Robinson, The Genocide Convention: A Commentary (1960) p. 64.

125/ The Committee on the Elimination of Discrimination against Women has recognized compulsory sterilization or abortion as a violation of the Convention on the Elimination of all Forms of Discrimination against Women. Report of the Committee on the Elimination of Discrimination against Women, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38), para. 22.

subparagraph (a) (iv). Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c).

(18) The present article clearly indicates that it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group as such.

(19) The Commission noted that a court that was called upon to apply the definition of the crime of genocide contained in the present article in a particular case might find it necessary to have recourse to other relevant provisions contained in the Convention either as conventional or as customary international law. For example, if a question should arise as to whether the crime of genocide set forth in the present article could be committed in time of peace, the court could find the authoritative answer to this question in article I of the Convention which confirmed this possibility.

(20) The Commission also noted that the fact that the present article was drawn from the Convention did not in any way affect the autonomous nature of that legal instrument. Furthermore, the Commission drew attention to article 4 of the present Code which expressly provided that it was "without prejudice to any question of the responsibility of States under international law". This would include any question relating to the responsibility of a State for genocide referred to in article IX of the Convention.

Article 18

Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

(a) murder;

(b) extermination;

(c) torture;

(d) enslavement;

(e) persecution on political, racial, religious or ethnic grounds;

(f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

(g) arbitrary deportation or forcible transfer of population;

(h) arbitrary imprisonment;

(i) forced disappearance of persons;

(j) rape, enforced prostitution and other forms of sexual abuse;

(k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Commentary

(1) Article 18 recognizes certain inhumane acts as constituting crimes against humanity.

(2) The definition of crimes against humanity contained in article 18 is drawn from the Nürnberg Charter, as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg.

(3) The opening clause of this definition establishes the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity covered by the present Code. The first condition requires that the act was "committed in a systematic manner or on a large scale". This first condition consists of two alternative requirements. The first alternative requires that the inhumane acts be *committed in a systematic manner* meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy. The Nürnberg Charter did not include such a requirement. None the less the Nürnberg Tribunal emphasized that the inhumane acts were committed as part of the *policy of terror* and were "in many cases ... organized and systematic" in considering whether such acts constituted crimes against humanity. 126/

(4) The second alternative requires that the inhumane acts be *committed on a large scale* meaning that the acts are directed against a multiplicity of

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126/ Nürnberg Judgement, p. 84.

victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Nürnberg Charter did not include this second requirement either. None the less the Nürnberg Tribunal further emphasized that the policy of terror was "certainly carried out on a vast scale" in its consideration of inhumane acts as possible crimes against humanity. 127/ The term "mass scale" was used in the text as adopted on first reading to indicate the requirement of a multiplicity of victims. This term was replaced by the term "large scale" in the present text which is sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude. The first condition is formulated in terms of the two alternative requirements. Consequently, an act could constitute a crime against humanity if either of these conditions is met.

(5) The second condition requires that the act was "instigated or directed by a Government or by any organization or group". The necessary instigation or direction may come from a Government or from an organization or a group. 128/ This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18. The instigation or direction of a Government or *any* organization

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127/ Nürnberg Judgement, p. 84.

128/ The Nürnberg Tribunal declared the criminal character of several organizations which were established for the purpose of and used in connection with the commission of crimes against peace, war crimes or crimes against humanity. The Charter and Judgement of the Nürnberg Tribunal recognized the possibility of criminal responsibility based on the membership of an individual in such a criminal organization. Nürnberg Charter, articles 9 and 10; and Nürnberg Judgement, p. 84. The present Code does not provide for any such collective criminal responsibility as indicated by article 2.

or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State. 129/

(6) The definition of crimes against humanity contained in the present article does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes as in the Nürnberg Charter. The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement. The Genocide Convention did not include any such requirement with respect to the second category of crimes against humanity, as discussed in the commentary to article 17. Similarly, the definitions of the first category of crimes against humanity contained in the legal instruments adopted since Nürnberg do not include any requirement of a substantive connection to other crimes relating to a state of war, namely, Control Council Law No. 10 adopted shortly after the Berlin Protocol as well as the more recent Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3). 130/ The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the Yugoslavia Tribunal: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict." 131/

(7) As regards the prohibited acts listed in article 18, the first such act consists of murder which is addressed in subparagraph (a). Murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation. Murder was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia

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129/ See Nürnberg Judgement regarding the defendants Streicher and von Schirach, pp. 129 and 144.

130/ See Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), document S/1995/134, n. 5. See also Morris and Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, p. 81.

131/ The Prosecutor v. Dusko Tadic, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 73.

(article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(8) The second prohibited act addressed in subparagraph (b) is extermination. The first two categories of prohibited acts consist of distinct and yet closely related criminal conduct which involves taking the lives of innocent human beings. Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared. Extermination was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(9) Another third prohibited act addressed in subparagraph (c) is torture. This prohibited act is defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 1, paragraph 1). 132/ It is true that the definition in the Torture

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132/ Article 1 of the Convention contains the following definition:

> 1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Convention limits the scope of that Convention to acts committed in an official capacity or with official connivance. But article 1, paragraph 2 contemplates that the term "torture" may have a broader application under other international instruments. In the context of crimes against humanity committed not only by governments but by organizations or groups this is appropriate here. For the present purposes, acts of torture are covered if committed in a systematic manner or on a mass scale by any government, organization or group. Torture was included as a crime against humanity in Control Council Law No. 10 (article II, paragraph c) and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3).

(10) The fourth prohibited act consists of enslavement under subparagraph (d). Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the 1926 Slavery Convention (slavery); the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and the 1957 Convention No. 29, adopted by the General Conference of the International Labour Organisation (forced labour). Enslavement was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(11) The fifth prohibited act consists of persecution on political, racial, religious or ethnic grounds under subparagraph (e). The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Articles 1 and 55) and the International Covenant on Civil and Political Rights (article 2). The present provision would apply to acts of persecution which lacked the specific intent required for the crime of genocide under article 17. Persecution on political, racial or religious grounds was included as a crime against humanity in the Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia

(article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(12) The sixth prohibited act is institutionalized discrimination on racial, ethnic or religious grounds involving the violation of human rights and fundamental freedoms and resulting in seriously disadvantaging a part of the population under subparagraph (f). The fifth and sixth categories of prohibited acts consist of distinct and yet closely related criminal conduct which involves the denial of the human rights and fundamental freedoms of individuals based on an unjustifiable discriminatory criterion. Whereas both categories of prohibited acts must be committed in a systematic manner or on a large scale to constitute a crime against humanity under the present article, the sixth category of prohibited acts further requires that the discriminatory plan or policy has been institutionalized, for example, by the adoption of a series of legislative measures denying individuals who are members of a particular racial, ethnic of religious group of their human rights or freedoms. The prohibited act covered by the present subparagraph consists of three elements: a discriminatory act committed against individuals because of their membership in a racial, ethnic or religious group, which requires a degree of active participation; the denial of their human rights and fundamental freedoms, which requires sufficiently serious discrimination; and a consequential serious disadvantage to members of the group comprising a segment of the population. It is in fact the crime of apartheid under a more general denomination. 133/ Institutionalized discrimination was not

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133/ Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid defines this crime as follows:

> For the purpose of the present Convention, the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:
>
> (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
>
> (i) By murder of members of a racial group or groups;
>
> (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting

included as a crime against humanity in the previous instruments. For this reason, the Commission decided to limit this crime to racial, ethnic or religious discrimination. The Commission noted that such racial discrimination was characterized as a crime against humanity in the Apartheid Convention (article I).

(13) The seventh prohibited act is arbitrary deportation or forcible transfer of population under subparagraph (g). Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State. The term "arbitrary" is used to exclude the acts when committed for legitimate reasons, such as public health or well being, in a manner consistent with international law. Deportation was included as a crime against humanity in the Nürnberg Charter

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them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to eduction, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

(article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (article 2, paragraph 11).

(14) The eighth prohibited act is "arbitrary imprisonment" under subparagraph (h). The term "imprisonment" encompasses deprivation of liberty of the individual and the term "arbitrary" establishes the requirement that the deprivation be without due process of law. This conduct is contrary to the human rights of individuals recognized in the Universal Declaration of Human Rights (article 9) and in the International Covenant on Civil and Political Rights (article 9). The latter instrument specifically provides that "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The present subparagraph would cover systematic or large-scale instances of arbitrary imprisonment such as concentration camps or detention camps or other forms of long-term detention. "Imprisonment" is included as a crime against humanity in Control Council Law No. 10 (article II, paragraph c) as well as the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3).

(15) The ninth prohibited act is forced disappearance of persons under subparagraph (i). In 1992 the General Assembly expressed its deep concern regarding the enforced disappearance of persons which occurred "in many countries" in adopting the Declaration on the Protection of All Persons from Enforced Disappearance. 134/ The problem of the disappearance of persons was also addressed in the 1994 Inter-American Convention on the Forced

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134/ The General Assembly referred to situations in which "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of law." General Assembly resolution 47/133.

Disappearance of Persons. 135/ The term "forced disappearance of persons" is used as a term of art to refer to the type of criminal conduct which is addressed in the Declaration and the Convention. Forced disappearance was not included as a crime against humanity in the previous instruments. Although this type of criminal conduct is a relatively recent phenomenon, the present Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity.

(16) The tenth prohibited act consists of rape, enforced prostitution and other forms of sexual abuse under subparagraph (j). There have been numerous reports of rape committed in a systematic manner or on a large scale in the former Yugoslavia. In this regard, the General Assembly unanimously reaffirmed that rape constitutes a crime against humanity under certain circumstances. 136/ Furthermore, the National Commission for Truth and Justice concluded in 1994 that sexual violence committed against women in a systematic manner for political reasons in Haiti constituted a crime against humanity. 137/ Rape, enforced prostitution and other forms of sexual abuse are forms of violence that may be specifically directed against women and therefore constitute a violation of the Convention on the Elimination of

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135/ Article II of the Convention contains the following definition:

> For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

136/ General Assembly resolution 50/192.

137/ Commission Nationale de Vérité et de Justice, SI M PA RELE: 29 septembre 1991 - 14 octobre 1994, press release dated Port-au-Prince, 6 February 1996.

all Forms of Discrimination against Women. 138/ Rape was included as a crime against humanity in Control Council Law No. 10 (article II, paragraph c) and the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3). While noting that persecution on gender grounds could also constitute a crime against humanity under subparagraph (e) if the two general criteria were met, the Commission decided to limit the possible grounds for persecution to those contained in existing legal instruments. Similarly, the Commission noted that gender-based discrimination might also constitute a crime against humanity under subparagraph (f), although not necessarily a crime against the peace and security of mankind. 139/

(17) The eleventh and last prohibited act consists of "other inhumane acts" which severely damage the physical or mental integrity, the health or the human dignity of the victim, such as mutilation and severe bodily harm, under subparagraph (k). The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. It should be noted that the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity. The subparagraph provides two examples of the types of acts

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138/ "The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty...Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention." Report of the Committee on the Elimination of Discrimination against Women, Official Records of the General Assembly, Forty-seventh session, Supplement No. 38 (A/47/38), p. 1.

139/ Gender-based persecution or discrimination entailing the denial of human rights and fundamental freedoms is contrary to the Charter of the United Nations; the International Covenant on Civil and Political Rights; the 1952 Convention on the Political Rights of Women, United Nations, Treaty Series, vol. 193, p. 135; the 1967 Declaration on the Elimination of Discrimination against Women, General Assembly resolution 2263 (XXII); and the 1979 Convention on the Elimination of All Forms of Discrimination against Women, United Nations, Treaty Series, vol. 1249, p. 13.

that would meet these two requirements, namely, mutilation and other types of severe bodily harm. The Nürnberg Charter (article 6 (c)), Control Council Law No. 10 (article II, paragraph c), the Statutes of the International Criminal Tribunals for the former Yugoslavia (article 5) and Rwanda (article 3) as well as the Nürnberg Principles (Principle VI) also included "other inhumane acts".

Article 19

Crimes against United Nations and associated personnel

> 1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:
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> (a) murder, kidnapping or other attack upon the person or liberty of any such personnel;
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> (b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.
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> 2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Commentary

(1) The United Nations was established for the purpose of, *inter alia*, maintaining the international peace and security of mankind and to that end taking effective collective measures to prevent and remove threats to the peace and to suppress acts of aggression or other breaches of the peace under Article 1 of the Charter of the United Nations. The Secretary-General stated that "whereas, in the past, working under the banner of the United Nations has provided its personnel with safe passage and an unwritten guarantee of protection, this is no longer the case, and such personnel are often at risk simply by virtue of their affiliation with organizations of the United Nations system". 140/ The seriousness and the magnitude of the dramatic increase in attacks on United Nations and associated personnel has been underscored not only by the Secretary-General, but also by the Security Council and the General Assembly. In the landmark report entitled "An Agenda for Peace" the

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140/ United Nations document A/AC.242/1, para. 4.

Secretary-General called attention to the problem of ensuring the safety of United Nations personnel deployed in conditions of strife for preventive diplomacy, peacemaking, peace-keeping, peace-building or humanitarian purposes due to the unconscionable increase in the number of fatalities resulting from attacks on such personnel. 141/ The Security Council commended the Secretary-General for calling attention to this problem, recognized that it was increasingly necessary to deploy United Nations forces and personnel in situations of real danger in discharging its responsibility for the maintenance of international peace and security and further demanded that States take prompt and effective action to deter and, where necessary, to prosecute and to punish all those responsible for attacks and other acts of violence against such forces and personnel. 142/ The General Assembly also expressed grave concern on a number of occasions about the growing number of fatalities and injuries among United Nations peace-keeping and other personnel resulting from deliberate hostile actions in dangerous areas of deployment. 143/ In addition, the General Assembly acknowledged the vital importance of the involvement of United Nations personnel in preventive diplomacy, peacemaking, peace-keeping, peace-building and humanitarian operations and resolutely condemned any hostile actions against such personnel, including the deliberate attacks against United Nations peace-keeping operations which have resulted in a disturbing number of casualties. 144/ Consequently the General Assembly unanimously adopted the Convention on the Safety of United Nations and Associated Personnel 145/ in 1994 with a view to deterring and, when necessary, ensuring the effective prosecution and punishment of the individuals who are responsible for such attacks.

(2) Attacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international

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141/ United Nations document A/47/277-S/24111, para. 66.

142/ United Nations document S/25493.

143/ General Assembly resolutions 47/120 B, 47/72 and 48/37.

144/ General Assembly resolution 47/72.

145/ General Assembly resolution 49/59, annex.

community. These crimes are of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind. These personnel are taking part in, present in an official capacity in the area of or otherwise associated with a United Nations operation which is "conducted in the common interest of the international community and in accordance with the principles and purposes of the Charter of the United Nations", as recognized in the preamble to the Convention. Attacks against such personnel are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security by means of collective security measures taken to prevent and remove threats to the peace. The international community has a special responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel which often occur in situations in which the national law-enforcement or criminal justice system is not fully functional or capable of responding to the crimes. Moreover, these crimes by their very nature often entail a threat to international peace and security because of the situations in which such personnel are involved, the negative consequences for the effective performance of the mandate entrusted to them and the broader negative consequences on the ability of the United Nations to perform effectively its central role in the maintenance of international peace and security. In terms of the broader negative implications of such attacks, there may be an increasing hesitancy or unwillingness on the part of individuals to participate in United Nations operations and on the part of Member States to make qualified personnel available to the Organization for such operations. For these reasons, the Commission decided to include this category of crimes in the present Code.

(3) Crimes against United Nations and associated personnel are addressed in article 19 which consists of two paragraphs. The first paragraph contains the definition of these crimes for purposes of the present Code. The second paragraph limits the scope of application of this definition by excluding attacks committed in certain situations.

(4) The opening clause of the first paragraph of the present article establishes the general criterion which must be met for crimes against

United Nations and associated personnel to constitute a crime against the peace and security of mankind under the present Code, namely, the criminal attacks must be committed either in a systematic manner or on a large scale. The first alternative criterion requires that the crimes be committed *in a systematic manner*, meaning pursuant to a preconceived plan or policy. This alternative may be met by a series of attacks which are actually carried out, by a single attack which is carried out as the first in a series of planned attacks, or by a single attack of extraordinary magnitude carried out pursuant to a preconceived policy or plan, such as the murder of the mediator entrusted with resolving the conflict situation as in the case of the assassination of Count Bernadotte. The second alternative criterion requires that the crimes be *committed on a large scale*, meaning that the criminal acts are directed against a multiplicity of victims either as a result of a series of attacks or a single massive attack resulting in extensive casualties. This dual criterion also appears in article 18 and is discussed in greater detail in the commentary thereto which is equally applicable to the present article in this respect. While any attack against United Nations and associated personnel is reprehensible, this criterion ensures that such an attack also entails the necessary threat to international peace and security required to constitute a crime covered by the present Code. However, conduct which does not meet the general criterion required for purposes of the Code would still constitute a crime under the Convention which does not require any such criterion and is not affected by the present provision. This is recognized in the opening phrase of the first paragraph which states that "The following *crimes* constitute crimes against the peace and security of mankind when". As in the case of the other crimes covered by Part II, the fact that the present Code does not extend to certain conduct is without prejudice to the characterization of that conduct as a crime under national or international law, including the Convention.

(5) For the purposes of article 19, a crime is committed only when the accused is shown to have done one of the acts referred to in subparagraphs (a) and (b) with the necessary intent. As to this intent, two elements are required. The first is that the attack on United Nations personnel must have been carried out "intentionally". The term "intentionally" is used to convey the requirement that the perpetrator of the crime must in fact have been aware that the personnel under attack were members of or associated with a United Nations operation. It is in this sense that the word "intentionally"

is used, for example, in article 2 of the Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973. 146/ It is used in the same sense in article 9 of the 1994 Convention. There is thus a requirement of an attack on United Nations or associated personnel as such.

(5) (a) In addition, however, article 19 requires that the attack should have been committed "with a view to preventing or impeding that operation from fulfilling its mandate". No such requirement is contained in the 1994 Convention, which seeks to protect United Nations and associated personnel against all intentional attacks. But in the context of a Code of Crimes against the Peace and Security of Mankind, the Commission took the view that the only attacks against such personnel which should be covered were those calculated or intended to prevent or impede the operation itself. Whether this was so in any particular case would be a question of fact. The broader scope of Article 9 of the 1994 Convention is of course not affected.

(6) The two categories of prohibited acts are set out in subparagraphs (a) and (b) of the first paragraph. The first category of acts consists of serious acts of violence perpetrated against a protected person, namely, "murder, kidnapping or other attack upon the person or liberty of any such personnel". The second category of acts consists of serious acts of violence upon particular places or modes of transportation which endanger a protected person, namely, a "violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty". These two categories of prohibited acts consisting of serious violent attacks are drawn from the definition of crimes contained in the Convention on the Safety of United Nations and Associated Personnel (article 9, paragraph 1 (a) and (b)). The ancillary crimes contained in the Convention are not reproduced in the present article since such crimes are addressed in article 2 in relation to all of the crimes covered by the Code.

146/ As indicated in the commentary to draft article 2, the Commission used "[t]he word 'intentional' ... both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim as well as to eliminate any doubt regarding exclusion from the application of the article of certain criminal acts which might otherwise be asserted to fall within the scope of subparagraphs (a) and (b), such as the serious injury of an internationally protected person in an automobile accident as a consequence of the negligence of the other party". Yearbook ... 1972, vol. II, para. 8.

(7) The potential victims of the crimes covered by the present article are limited to United Nations 147/ and associated personnel, as indicated by the reference to crimes committed *against* such personnel. 148/ These terms are defined in the Convention and should be understood as having the same meaning in the present article. In addition, the crimes must be committed against protected persons who are "involved in a United Nations operation". The term "involved" is used to cover the various categories of protected persons who are taking part in, present in an official capacity in an area of or otherwise associated with a United Nations operation as indicated in the definitions of the protected persons contained in the

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147/ Article 1, paragraph (a) of the Convention contains the following definition:

> (a) "United Nations personnel" means:
>
> (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;
>
> (ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted ...

148/ Article 1, paragraph (b) of the Convention contains the following definition:

> (b) "Associated personnel" means:
>
> (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
>
> (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
>
> (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency,
>
> to carry out activities in support of the fulfilment of the mandate of a United Nations operation ...

Convention. The term "United Nations operation" is defined in the Convention and should be understood as having the same meaning in the present article. 149/

(8) Paragraph 2 of the present article is intended to avoid characterizing as criminal any conduct that is directed against personnel involved in a United Nations operation which is mandated under Chapter VII of the Charter of the United Nations to take part in an enforcement action and is in fact taking part in a combat situation against organized armed forces to which the law of international armed conflict applies. 150/ This paragraph is designed to ensure that United Nations personnel are covered by the present article unless they are covered by the law of international armed conflict which is addressed in article 20.

Article 20

War crimes

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(a) any of the following acts committed in violation of international humanitarian law:

(i) wilful killing;

(ii) torture or inhuman treatment, including biological experiments;

149/ Article 1, paragraph (c) of the Convention contains the following definition:

> (c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under the United Nations authority and control:
>
> (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or
>
> (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation ...

150/ See the discussion of international humanitarian law in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion by the General Assembly of the United Nations), para. 75, to be published in I.C.J. Reports (1966).

(iii) wilfully causing great suffering or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer or unlawful confinement of protected persons;

(viii) taking of hostages;

(b) any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

(i) making the civilian population or individual civilians the object of attack;

(ii) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iii) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iv) making a person the object of attack in the knowledge that he is hors de combat;

(v) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;

(c) any of the following acts committed wilfully in violation of international humanitarian law.

(i) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

(ii) unjustifiable delay in the repatriation of prisoners of war or civilians;

(d) outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(e) any of the following acts committed in violation of the laws or customs of war:

- (i) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (ii) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (iii) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or of demilitarized zones;
- (iv) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (v) plunder of public or private property;

(f) any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

- (i) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (ii) collective punishments;
- (iii) taking of hostages;
- (iv) acts of terrorism;
- (v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (vi) pillage;
- (vii) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable;

(g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

Commentary

(1) For the title of this article, the Commission preferred to retain the expression "war crimes" rather than the expression "violations of humanitarian law applicable in armed conflict". Although the second expression is legally more correct, the Commission preferred the first, which is shorter. When consulted, as of the submission of the first reports, the Commission preferred the expression "war crimes". The expressions "violations of the laws and customs of war" and "violations of the rules of humanitarian law applicable in armed conflict" are, however, also used in the body of the report.

(2) The war crimes referred to in the Nürnberg Charter under the general heading of "violations of the laws and customs of war" did not involve any general definition.

(3) The authors of the Nürnberg Charter worked on the basis of a list, stating, however, that the list was not restrictive. 151/ The Nürnberg Tribunal also stated that the violations listed were already covered by the 1907 Hague Convention, as well as by the 1929 Geneva Convention.

(4) The present article 20 reproduces, *inter alia*, the categories of war crimes provided for by the 1907 and 1929 Conventions as well as the 1949 Geneva Conventions and Protocols Additional thereto. However, the Commission considered that the above-mentioned acts must also meet the general criteria indicated in the *chapeau* of article 20 or, in other words, that they must have been committed *in a systematic manner* or *on a large scale* in order to constitute crimes under the present Code, i.e. crimes against the peace and security of mankind.

(5) These general criteria for war crimes under the Code are based on the view that crimes against the peace and security of mankind are the most serious on the scale of international offences and that, in order for an offence to be regarded as a crime against the peace and security of mankind, it must meet certain additional criteria which raise its level of seriousness.

151/ The list of war crimes included, but was not limited, to: "murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".

These general criteria are provided for in the chapeau of the article: the crimes in question must have been committed in a systematic manner or on a large scale.

(6) This additional requirement is the result of the fact that, until the Nürnberg Judgement, the word "crime" in the expression "war crimes" was not taken in its technical sense, i.e. as meaning the most serious on the scale of criminal offences, but, rather, in the general sense of an offence, i.e. the non-fulfilment of an obligation under criminal law, regardless of the seriousness of such non-fulfilment. The Commission thus deemed it necessary to raise the level of seriousness that a war crime must have in order to qualify as a crime against the peace and security of mankind. Hence its criteria of an act committed in a systematic manner or on a large scale.

(7) A crime is systematic when it is committed accordingly to a preconceived plan or policy. A crime is committed on a large scale when it is directed against a multiplicity of victims, either as a result of a series of attacks or of a single massive attack against a large number of victims.

(8) Not every war crime is thus a crime against the peace and security of mankind. An offence must have the general characteristics described above in order to constitute a crime against the peace and security of mankind.

(9) The list of crimes referred to in article 20 has not been made up ex nihilo. Most of the acts are recognized by international humanitarian law and are listed in different instruments.

(10) The first category of war crimes addressed in subparagraph (a) consists of grave breaches of international humanitarian law as embodied in the 1949 Geneva Conventions. Subparagraph (a) (i) to (iii) covers grave breaches of the four Geneva Conventions, namely, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I, article 50); 152/ the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II, article 51); 153/ the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III, article 130)); 154/ and the Geneva Convention Relative to

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152/ United Nations, Treaty Series, vol. 75, p. 31.

153/ Ibid., p. 85.

154/ Ibid., p. 135.

the Protection of Civilian Persons in Time of War (Geneva Convention IV, article 147). 155/ Subparagraph (a) (iv) covers grave breaches that are common to Geneva Conventions I, II and IV. Subparagraph (a) (v) and (vi) covers grave breaches that are common to Geneva Conventions III and IV. Subparagraph (a) (vii) and (viii) covers grave breaches of Geneva Convention IV. The provisions of the present subparagraph should be understood as having the same meaning and scope of application as the corresponding provisions contained in the Conventions. 156/ This provision closely resembles the corresponding provision contained in the Statute of the International Criminal Tribunal for the former Yugoslavia (article 3).

(11) The second and third categories of war crimes addressed in subparagraphs (b) and (c) cover the grave breaches listed in Protocol I Additional to the 1949 Geneva Conventions. 157/ As to the second category, subparagraph (b) covers the grave breaches contained in article 85, paragraph 3, of Additional Protocol I. The opening clause of this paragraph reproduces two general criteria contained in article 85, paragraph 3, namely, the acts must be committed wilfully and must cause death or serious injury to body or health. Subparagraph (b) (i) to (v) covers the grave breaches listed in article 85, paragraph 3 (a) to (c), (e) and (f), respectively. 158/ As regards the third category, subparagraph (c) covers the grave breaches listed in article 85, paragraph 4, of Additional Protocol I. The opening clause of this subparagraph reproduces the general criterion contained in article 85, paragraph 4, namely, the acts must be committed wilfully. Subparagraph (c) (i) and (ii) covers the grave breaches contained in

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155/ Ibid., p. 287.

156/ In this regard, the authoritative commentaries to the 1949 Geneva Conventions prepared by the International Committee of the Red Cross would be equally applicable to the present provisions.

157/ Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Additional Protocol I], United Nations, Treaty Series, vol. 1125 p. 3.

158/ Subparagraph (e) (iii) covers the remaining grave breach listed in article 85, paragraph 3 (d).

article 85, paragraph 4 (a) and (b). 159/ Subparagraphs (b) and (c) should be understood as having the same meaning and scope of application as the corresponding provisions contained in the Protocol. 160/ These subparagraphs are formulated in general terms and do not reproduce the references to the specific articles of Additional Protocol I which provide the underlying standard of conduct for purposes of the grave breaches provisions contained in article 85. None the less the relevant standard of conduct is equally applicable to the present subparagraphs.

(12) The fourth category of war crimes addressed in subparagraph (d) consists of "outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". This type of conduct clearly constitutes a grave breach of Geneva Conventions I to IV under subparagraph (a) (ii) and (iii). None the less the Commission considered that it was important to reaffirm explicitly the criminal nature of such conduct as a war crime when committed in armed conflict of an international character in view of the unprecedented reports of this type of criminal conduct having been committed in a systematic manner or on a large scale in the former Yugoslavia. This provision is drawn from article 4, paragraph 2 (e), of Additional Protocol II to the 1949 Geneva Conventions, which characterizes this conduct as a violation of the *fundamental guarantees* to which all protected persons are entitled during an armed conflict of a non-international

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159/ Other provisions of the present article cover the remaining grave breaches listed in article 85, paragraph 4: subparagraph (a) (vi) covers the grave breach listed in article 85, paragraph 4 (e); subparagraph (a) (vii) covers the grave breach relating to deportation or transfer listed in article 85, paragraph 4 (a); subparagraph (d) covers the grave breach listed in article 85, paragraph 4 (c); and subparagraph (e) (iv) covers the grave breach listed in article 85, paragraph 4 (d). The grave breach listed in article 85, paragraph 4 (c), is covered not only as a war crime under the more general language contained in subparagraph (d) of the present article, but also as a crime against humanity under article 18, subparagraph (f) of which does not require the existence of an armed conflict.

160/ In this regard, the authoritative commentary to Additional Protocol I prepared by the International Committee of the Red Cross would be equally applicable to the present provisions.

character. 161/ The Commission noted that the fundamental guarantees provided for by the law applicable to armed conflict of a non-international character constitutes a minimum standard of humanitarian treatment of protected persons which is applicable to any type of armed conflict, whether international or non-international in character. This is clearly recognized in common article 3 of the 1949 Geneva Conventions and article 4, paragraph 2, of Additional Protocol II.

(13) The fifth category of war crimes addressed in subparagraph (e) consists primarily of serious violations of the laws and customs of war on land as embodied in the 1907 Hague Convention (IV) and the regulations annexed thereto. 162/ The Commission noted that subparagraph (e) (iv) would cover, *inter alia*, the cultural property protected by the 1954 Hague Convention for the Protection of Cultural Property, 163/ as well as the literary and artistic works protected by the Berne Convention for the Protection of Literary and Artistic Work. 164/ This provision is based on the Nürnberg Charter (article 6 (c)) and the Statute of the International Criminal Tribunal for the former Yugoslavia (article 3). In contrast to those instruments, the present provision provides an exhaustive list of violations of the laws or customs of war to provide a greater degree of certainty in terms of the conduct covered by the present Code. In addition, subparagraph (e) (iii) covers the grave breach listed in article 85,

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161/ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Additional Protocol II], United Nations, *Treaty Series*, vol. 1125 p. 609.

162/ The Hague Convention (IV) Respecting the Laws and Customs of War on Land, with annex of regulations, *Bevans*, vol. I, p. 631.

163/ United Nations, *Treaty Series*, vol. 249, p. 216.

164/ WIPO Publication No. 287(E).

paragraph 3 (d), concerning demilitarized zones. The term "demilitarized zone" has the same meaning in the present provision as in article 60 of Additional Protocol I. 165/

(14) The sixth category of war crimes addressed in subparagraph (f) consists of serious violations of international humanitarian law applicable in non-international armed conflict contained in common article 3 of the 1949 Geneva Conventions and article 4 of Protocol II Additional to the Geneva Conventions. 166/ The provisions of this subparagraph should be understood as having the same meaning and scope of application as the corresponding provisions contained in the Conventions and the Protocol. 167/ Subparagraph (f) (i) covers violations of common article 3, paragraph 1 (a), of the Geneva Conventions and of article 4, paragraph 2 (a), of Additional Protocol II. Subparagraph (f) (ii) covers violations of article 4, paragraph 2 (b), of Additional Protocol II. Subparagraph (f) (iii) covers violations of common article 3, paragraph 1 (b), of the Geneva Conventions and of article 4, paragraph 2 (c), of Additional Protocol II. Subparagraph (f) (iv) covers violations of article 4, paragraph 2 (d), of Additional Protocol II. Subparagraph (f) (v) covers violations of common article 3, paragraph 1 (c), of the Geneva Conventions and of the more detailed article 4, paragraph 2 (e), of Additional

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165/ "It is quite clear that the drafters of article 60 did not have such zones in mind, even though they provided that demilitarized zones could be created already in time of peace. In fact, such different types of demilitarized zones, created by treaty ... are not created for wartime but for peacetime, or at least for an armistice. In fact, this is the essential character of the zones created in article 60: they have a humanitarian and not a political aim; they are specially intended to protect the population living there against attacks. Admittedly, there is nothing to prevent a demilitarized zone created by a peace treaty, armistice or any other international agreement, from becoming a demilitarized zone in accordance with article 60 in the case of armed conflict, provided this is done by means of a new agreement". Commentary to Additional Protocol I, p. 709.

166/ Hereafter cited Additional Protocol II.

167/ In this regard, the authoritative commentaries to the 1949 Geneva Conventions and Additional Protocol II prepared by the International Committee of the Red Cross would be equally applicable to the present provisions.

Protocol II. 168/ Subparagraph (f) (vi) covers violations of article 4, paragraph 2 (g), of Additional Protocol II. Subparagraph (f) (vii) covers violations of common article 3, paragraph 1 (d), of the Geneva Conventions. The present subparagraph is drawn from the Statute of the International Criminal Tribunal for Rwanda (article 4), which is the most recent statement of the relevant law. The Commission considered this subparagraph to be of particular importance in view of the frequency of non-international armed conflicts in recent years. The Commission noted that the principle of individual criminal responsibility for violations of the law applicable in internal armed conflict had been reaffirmed by the International Criminal Tribunal for the former Yugoslavia. 169/

(15) The seventh category of war crimes addressed in subparagraph (g) covers war crimes which have their basis in articles 35 and 55 of Additional Protocol I. Violations of these provisions are not characterized as a grave breach entailing individual criminal responsibility under the Protocol. The present subparagraph contains three additional elements which are required for violations of the Protocol to constitute a war crime covered by the present Code. First, the use of the prohibited methods or means of warfare was not justified by military necessity. The term "military necessity" is used in the present provision to convey the same meaning as in the relevant provisions of existing legal instruments, for example, article 23 (g) of the 1907 Hague Convention (IV) Regulations, 170/ the grave breaches provisions contained in articles 50, 51 and 147 of Geneva Conventions I, II and IV, respectively, article 33 of Geneva Convention I 171/ and article 53 of Geneva

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168/ These violations when committed in an armed conflict of an international character would be covered by the identical provision contained in subparagraph (d) of the present article.

169/ The Prosecutor v. Dusko Tadic, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 68.

170/ Article 23 (g) states that "it is expressly forbidden ... [t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".

171/ Article 33 of Geneva Convention I prohibits the diversion of buildings or materials belonging to enemy medical units subject to a limited exception "in cases of urgent military necessity". The commentary to this article refers to "the exception of urgent military necessity" as "an accepted principle of international law". Commentary to Geneva Convention I, p. 275.

Convention IV. 172/ Secondly, the conduct was committed with the specific "intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population". In this regard, the present provision requires that the conduct should result in more serious consequences for the population in order to constitute a war crime covered by the present Code, namely, *gravely* prejudicial consequences as compared to prejudicial consequences required for a violation of Additional Protocol I. Thirdly, the present subparagraph requires that such damage actually occurred as a result of the prohibited conduct. The Commission considered that this type of conduct could constitute a war crime covered by the present Code when committed during an international or a non-international armed conflict. Thus, the present subparagraph applies "in the case of armed conflict", whether of an international or a non-international character, in contrast to the more limited scope of application of Additional Protocol I to international armed conflict. The opening clause of the present subparagraph does not include the phrase "in violation of international humanitarian law" to avoid giving the impression that this type of conduct necessarily constitutes a war crime under existing international law in contrast to the preceding subparagraphs. 173/

172/ Article 53 recognizes an exception to the prohibited destruction of certain property "where such destruction is rendered absolutely necessary by military operations".

173/ The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict prepared by the International Committee of the Red Cross state that "Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law". Document A/49/323, annex.

CHAPTER III

STATE RESPONSIBILITY

A. Introduction

51. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law concerning State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility and appointed F.V. Garcia Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports, dealing on the whole with the question of responsibility for injuries to the persons or property of aliens. [174]

52. The Commission at its fourteenth session in 1962 set up a Sub-Committee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study. [175]

53. At its fifteenth session in 1963, the Commission, after having unanimously approved the report of the Sub-Committee, appointed Mr. Roberto Ago as Special Rapporteur for the topic.

54. The Commission, from its twenty-first (1969) to its thirty-first sessions (1979) received eight reports from the Special Rapporteur. [176]

55. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content,

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[174] Yearbook ... 1969, vol. II, p. 229.

[175] Ibid., p. 229 et seq.

[176] For the eight reports of the Special Rapporteur see: Yearbook ... 1969, vol. II, doc. A/CN.4/217 and Add.1, pp. 125-156. Yearbook ... 1970, vol. II, doc. A/CN.4/233, pp. 177-198. Yearbook ... 1971, vol. II, (Part One), doc. A/CN.4/246 and Adds. 1-3, p. 199. Yearbook ... 1972, vol. II, doc. A/CN.4/264 and Add.1, p. 71. Yearbook ... 1976, vol. II, (Part One), doc. A/CN.4/291 and Add.1 and 2 pp. 3-55. Yearbook ... 1977, vol. II (Part One), doc. A/CN.4/302 and Add.1-3. Yearbook ... 1978, vol. II (Part One), doc. A/CN.4/318 and Add.1-4 and 1980, doc. A/CN.4/318/Add.5-7).

forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation of international responsibility. 177/

56. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 178/

57. At its thirty-first session (1979), the Commission, in view of the election of Mr. Ago as a Judge to the International Court of Justice, appointed Mr. Willem Riphagen Special Rapporteur for the topic.

58. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from Mr. Willem Riphagen, 179/ for Parts Two and Three of the topic. 180/

59. At its thirty-ninth session in 1987 the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Willem Riphagen, whose term of office as a Member of the Commission expired on

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177/ Yearbook ... 1975, vol. II, pp. 55-59, doc. A/10010/Rev.1, paras. 38-51.

178/ Yearbook ... 1980, vol. II (Part Two), pp. 26-63, doc. A/35/10, chap. III.

179/ For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, doc. A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, doc. A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, doc. A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, doc. A/CN.4/366; and Add.1;
Yearbook ... 1984; vol. II (Part One), p. 1, doc. A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, doc. A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, doc. A/CN.4/397; and Add.1.

180/ At its thirty-fourth session (1983) the Commission referred draft articles 1 to 6 of Part Two to the Drafting Committee. At its thirty-seventh session (1985) the Commission decided to refer articles 7 to 16 of Part Two to the Drafting Committee. At its thirty-eighth session (1986) the Commission decided to refer draft articles 1 to 5 of Part Three and its annex to the Drafting Committee.

31 December 1986. The Commission, from its fortieth (1988) to its forty-eighth (1996) sessions, received eight reports from Mr. Gaetano Arangio-Ruiz. 181/

60. At the conclusion of its forty-seventh session, the Commission had provisionally adopted for inclusion in Part Two, draft articles 1 to 5 182/ and articles 6 (Cessation of wrongful conduct), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 bis (Guarantees of non-repetition), 183/ 11 (Countermeasures) by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures). 184/ It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to

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181/ For the eight reports of the Special Rapporteur, see Yearbook ... 1986, vol. II (Part One), p. 6, doc. A/CN.4/416 and Add.1; Yearbook ... 1990, vol. II (Part One), doc. A/CN.4/425 and Add.1; Yearbook ... 1991, vol. II (Part One), doc. A/CN.4/440 and Add.1; doc. A/CN.4/444 and Add.1-3; doc. A/CN.4/453 and Add.1 and Corr.1, 2, 3 and Add.2 and 3; doc. A/CN.4/461 and Add.1 and 2; doc. A/CN.4/469 and Corr.1 (English only) and Add.1 and 2 and A/CN.4/476 and Corr.1 (English only) and Add.1. At its forty-first session (1989) the Commission referred to the Drafting Committee draft articles 6 and 7 of Chapter Two (legal consequences deriving from an international delict) of Part Two of the draft articles. At its forty-second session (1990) the Commission referred draft articles 8, 9 and 10 of Part Two to the Drafting Committee. At its forty-fourth session (1992) the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 bis for inclusion in Part Two of the draft articles. At its forty-fifth session (1993) the Commission referred to the Drafting Committee draft articles 1 to 6 of Part Three and Annex thereto. At its forty-seventh session (1995) the Commission referred to the Drafting Committee articles 15 to 20 of Part One dealing with the legal consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft articles and new draft article 7 to be included in Part Three of the draft.

182/ For the text of articles 1 to 5 (para. 1), with commentaries, see Yearbook ... 1985, vol. II (Part Two), pp. 24 et seq.

183/ For the text of article 5, para. 2 and articles 6, 6 bis, 7, 8, 10 and 10 bis, with commentaries, see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), pp. 132 et seq.

184/ For the text of articles 11, 13 and 14, see ibid., Forty-ninth session, Supplement No. 10 (A/49/10), footnote 362. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (see ibid., para. 352).

countermeasures), on which it deferred action. 185/ At its forty-seventh session the Commission had also provisionally adopted for inclusion in Part Three, article 1 (Negotiation), article 2 (Good offices and mediation), article 3 (Conciliation), article 4 (Task of the Conciliation Commission), article 5 (arbitration), article 6 (Terms of reference of the Arbitral Tribunal), article 7 (Validity of an arbitral award) and Annex, article 1 (The Conciliation Commission) and article 2 (The Arbitral Tribunal).

B. Consideration of the topic at the present session

61. At its present session the Commission had before it the eighth report of the Special Rapporteur, Mr. Arangio-Ruiz. 186/ The report dealt with problems relating to the regime of internationally wrongful acts singled out as "crimes" based on article 19 of Part One as well as some other issues to which he deemed it necessary to call the attention of the Commission. The Commission considered the report at its 2436th meeting on 5 June 1996.

62. At the 2438th meeting of the Commission on 7 June 1996, Mr. Arangio-Ruiz announced his resignation as Special Rapporteur.

63. The Drafting Committee completed the first reading of draft articles of Parts Two and Three on State responsibility. The Commission considered the Report of the Drafting Committee at its 2452nd to 2459th meetings from 3 to 12 July 1996. 187/

64. At its 2473rd meeting, on 26 July 1996 the International Law Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles set out in Section D of the present chapter, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998.

C. Tribute to the Special Rapporteurs

65. At its 2459th meeting on 12 July 1996, the Commission, after adopting the text of the draft article on State responsibility, adopted the following resolution by acclamation:

185/ See ibid., para. 352.

186/ A/CN.4/476 and A/CN.4/476/Add.1 and Corr.1 (English only) and Add.1.

187/ For the report of the Drafting Committee see document A/CN.4/L.524.

"The International Law Commission,

Having adopted provisionally the draft articles on State responsibility,

Wishes to express its deep appreciation for the outstanding contribution the three Special Rapporteurs, Judge Ago, Messrs. Willem Riphagen and Arangio-Ruiz have made to the treatment of the topic through their scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on State responsibility."

D. Draft articles on State responsibility

1. Text of the draft articles provisionally adopted by the Commission on first reading

STATE RESPONSIBILITY

Part One

Origin of international responsibility

CHAPTER I

GENERAL PRINCIPLES

Article 1 [188]

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2 [189]

Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

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[188] For the commentary to the article, see Yearbook ... 1973, vol. II, pp. 173-176.

[189] For the commentary to the article, see ibid., pp. 176-179.

Article 3 190/

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(a) conduct consisting of an action or omission is attributable to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.

Article 4 191/

Characterization of an act of a State as internationally wrongful

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

CHAPTER II

THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

Article 5 192/

Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

Article 6 193/

Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

190/ For the commentary to the article, see ibid., pp. 179-184.

191/ For the commentary to the article, see ibid., pp. 184-188.

192/ For the commentary to the article, see ibid., pp. 191-193.

193/ For the commentary to the article, see ibid., pp. 193-198.

Article 7 194/

Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8 195/

Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9 196/

Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

194/ For the commentary to the article, see Yearbook ... 1974, vol. II (Part One), pp. 277-283.

195/ For the commentary to the article, see ibid., pp. 283-286.

196/ For the commentary to the article, see ibid., pp. 286-290.

Article 10 [197]

Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

Article 11 [198]

Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12 [199]

Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

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[197] For the commentary to the article, see Yearbook ... 1975, vol. II, pp. 61-70.

[198] For the commentary to the article, see ibid., pp. 70-83.

[199] For the commentary to the article, see ibid., pp. 83-86.

Article 13 200/

Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Article 14 201/

Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that Sate by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15 202/

Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

200/ For the commentary to the article, see ibid., pp. 87-91.

201/ For the commentary to the article, see ibid., pp. 91-99.

202/ For the commentary to the article, see ibid., pp. 99-106.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16 203/

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Article 17 204/

Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Article 18 205/

Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

203/ For the commentary to the article, see Yearbook ... 1976, vol. II (Part Two), pp. 78-79.

204/ For the commentary to the article, see ibid., pp. 79-87.

205/ For the commentary to the article, see ibid., pp. 87-95.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

Article 19 [206]

International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

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[206] For the commentary to the article, see ibid., pp. 95-122.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Article 20 207/

Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21 208/

Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 22 209/

Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

207/ For the commentary to the article, see Yearbook ... 1977, vol. II (Part Two), pp. 11-18.

208/ For the commentary to the article, see ibid., pp. 18-30.

209/ For the commentary to the article, see ibid., pp. 30-50.

Article 23 210/

Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24 211/

Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25 212/

Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

210/ For the commentary to the article, see Yearbook ... 1978, vol. II (Part Two), pp. 81-86.

211/ For the commentary to the article, see ibid., pp. 86-89.

212/ For the commentary to the article, see ibid., pp. 89-97.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26 [213]

Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

CHAPTER IV

IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

Article 27 [214]

Aid or assistance by a State to another State for the commission of an internationally wrongful act

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

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[213] For the commentary to the article, see ibid., pp. 97-98.

[214] For the commentary to the article, see ibid., pp. 99-105.

Article 28 [215]

Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other provisions of the present articles, of the State which has committed the internationally wrongful act.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 29 [216]

Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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[215] For the commentary to the article, see Yearbook ... 1979, vol. II (Part Two), pp. 94-106.

[216] For the commentary to the article, see ibid., pp. 109-115.

Article 30 217/

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

Article 31 218/

Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Article 32 219/

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

217/ For the commentary to the article, see ibid., pp. 115-122.

218/ For the commentary to the article, see ibid., pp. 122-133.

219/ For the commentary to the article, see ibid., pp. 133-136.

Article 33 220/

State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Article 34 221/

Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

220/ For the commentary to the article, see Yearbook ... 1980, vol. II (Part Two), pp. 34-52.

221/ For the commentary to the article, see ibid., pp. 52-61.

Article 35 222/

Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.

Part Two

Content, forms and degrees of international responsibility

CHAPTER I

GENERAL PRINCIPLES

Article 36 223/

Consequences of an internationally wrongful act

1. The international responsibility of a State which, in accordance with the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this Part.

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 37 224/

Lex specialis

The provisions of this Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

222/ For the commentary to the article, see ibid., pp. 61-62.

223/ For the commentary to paragraph 1 of the article (former article 1), see *Yearbook ... 1983*, vol. II (Part Two), p. 42. For the commentary to paragraph 2, see *Yearbook ... 1993*, vol. II (Part Two), pp. 54-55.

224/ For the commentary to the article (former article 2), see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.

Article 38 225/

Customary international law

The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part.

Article 39 226/

Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate,

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[225] For the commentary to the article (former article 3), see ibid., p. 43.

[226] For the commentary to the article (former article 4), see ibid.

The Commission recognized that, to the extent that articles are ultimately adopted in the form of a convention, the relationship of such a convention with the Charter is governed by Article 103 of the Charter. Given that the provisions of the Charter prevail, many members of the Commission were apprehensive that a State's rights or obligations under the convention - that is based on the law of State responsibility - could be overridden by decisions of the Security Council taken under Chapter VII of the Charter which, under Article 25 of the Charter, Member States are bound to accept and carry out.

For example, would the Security Council, acting in order to maintain or restore international peace and security, be able to deny a State's plea of necessity (article 33), or a State's right to take countermeasures (articles 47 and 48), or impose an obligation to arbitrate (article 58)?

On one view the Security Council could not, as a general rule, deprive a State of its legal rights, or impose obligations beyond those arising from general international law and the Charter itself. Exceptionally, it might call on a State to suspend the exercise of its legal rights, as for example when requiring the suspension of countermeasures as a provisional measure under Article 40 of the Charter. Or the denial of legal rights might be more permanent in the case of a State determined to be an aggressor. But on this view the Security Council should in general act with full regard for the legal rights of States.

A different view would regard this approach as too restrictive, too "legalistic", and as minimizing the overriding interest of the entire community of States in preserving international peace.

The terms of article 39 do not seek to resolve this question, one way or the other. The Commission would welcome quite specific comments by States on the issues raised, so that, during the course of its second reading, the Commission could return to these important issues.

to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 40 227/

Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

  (i) the right has been created or is established in its favour;

  (ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

  (iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if

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227/ For the commentary to the article (former article 5), see *Yearbook ... 1985*, vol. II (Part Two), pp. 25-27.

it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime*, all other States.

CHAPTER II

RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 41 228/

Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 42 229/

Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(a) the injured State; or

(b) a national of that State on whose behalf the claim is brought;

which contributed to the damage.

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* The term "crime" is used for consistency with article 19 of Part One of the articles. It was, however, noted that alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, inter alia, avoiding the penal implication of the term.

228/ For the commentary to the article (former article 6), see Yearbook ... 1993, vol. II (Part Two), pp. 55-58.

229/ For the commentary to paragraphs 1, 2 and 4 (former 3) of the article, see ibid., pp. 58-61. For the commentary to paragraph 3, see Section D (2) below.

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

Article 43 230/

Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible;

(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 44 231/

Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

230/ For the commentary to the article (former article 7), see Yearbook ... 1993, vol. II (Part Two), pp. 61-67.

231/ For the commentary to the article (former article 8), see ibid., pp. 67-76.

Article 45 232/

Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) an apology;

(b) nominal damages;

(c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Article 46 233/

Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

232/ For the commentary to the article (former article 10), see ibid., pp. 76-81.

233/ For the commentary to the article (former article 10 bis), see ibid., pp. 81-83.

CHAPTER III

COUNTERMEASURES

Article 47 234/

Countermeasures by an injured State

1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.

2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.

3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State.

Article 48 235/

Conditions relating to resort to countermeasures

1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this Chapter.

2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

234/ For the commentary to the article (former article 11), see Section D (2) below.

235/ For the commentary to the article (former article 12), see Section D (2) below.

4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure.

Article 49 236/

Proportionality

Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 50 237/

Prohibited countermeasures

An injured State shall not resort by way of countermeasures to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention of a peremptory norm of general international law.

236/ For the commentary to the article (former article 13), see the Report of the Commission on the work of its forty-seventh session (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10)), pp. 144-149.

237/ For the commentary to the article (former article 14), see ibid., pp. 149-173.

CHAPTER IV

INTERNATIONAL CRIMES

Article 51 238/

Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.

Article 52 239/

Specific consequences

Where an internationally wrongful act of a State is an international crime:

(a) an injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;

(b) an injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Article 53 240/

Obligations for all States

An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as lawful the situation created by the crime;

(b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

(c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and

(d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

238/ For the commentary to the article, see Section D (2) below.

239/ For the commentary to the article, see ibid.

240/ For the commentary to the article, see ibid.

Part Three

Settlement of disputes

Article 54 241/

Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 55 242/

Good offices and mediation

Any State Party to the present articles, not being a party to the dispute may, at the request of any party to the dispute or upon its own initiative, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 56 243/

Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in annex I to the present articles.

Article 57 244/

Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary

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241/ For the commentary to the article (former article 1), see the Report of the Commission on the work of its forty-seventh session (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10)), pp. 173-174.

242/ For the commentary to the article (former article 2), see ibid., pp. 175-176.

243/ For the commentary to the article (former article 3), see ibid., pp. 176-178.

244/ For the commentary to the article (former article 4), see ibid., pp. 178-182.

information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its later recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 58 245/

Arbitration

1. Failing a referrence of the dispute to the Conciliation Commission provided for in article 56 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

245/ For the commentary to the article (former article 5), see ibid., pp. 182-184.

Article 59 246/

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in annex II to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 60 247/

Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Annex I 248/

The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be

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246/ For the commentary to the article (former article 6), see ibid., pp. 185-186.

247/ For the commentary to the article (former article 7), see ibid., pp. 186-189.

248/ For the commentary to the annex (former article 1 of Annex), see ibid., pp. 189-192.

renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 56 by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Annex II [249]

The Arbitral Tribunal

1. The Arbitral Tribunal referred to in articles 58 and 60, paragraph 2 shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

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[249] For the commentary to the annex (former article 2 of Annex), see ibid., pp. 192-194.

2. Text of draft articles 42, (para. 3), 47, 48 and 51 to 53 with commentaries thereto provisionally adopted by the Commission at its forty-eighth session

66. The text of draft articles 42 (para. 3), 47, 48 and 51 to 53 with commentaries thereto provisionally adopted by the Commission at its forty-eighth session is produced below.

Article 42

Reparation

...

> 3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

...

Commentary

8(a)* In the context of some of the specific forms of reparation (in particular, restitution in kind and satisfaction), the question has arisen whether there is any limit to the notion of full reparation. There are examples in history of the burden of "full reparation" being taken to such a point as to endanger the whole social system of the State concerned, for example in the context of a peace treaty following the defeat of a particular State. These are of course extreme cases, but within the whole spectrum of possible cases of responsibility the extreme case may not be excluded. Accordingly, paragraph 3 provides that reparation is not to result in depriving the population of a State of its own means of subsistence. This has, of course, nothing to do with the obligation of cessation, including the return to the injured State, for example, of territory wrongfully seized. But in other contexts - e.g. the payment of sums of money by way of compensation or satisfaction - the amounts required, or the terms on which payment is required to be made should not be such as to deprive the population of its own means of subsistence. The language of paragraph 3 is drawn from article 1, paragraph 2 of the International Covenants on Human Rights of 1966, and reflects a legal principle of general application.

8(b) Some members disagreed with the inclusion of paragraph 3. They were of the view that the provision was inappropriate and that in any event the provision should not apply where the population of the injured State would be similarly disadvantaged by a failure to make full reparation on such grounds. Then delete paragraph (16) of the commentary to article 42.

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* These paragraphs should be placed after paragraph 8 of the existing commentary to the article which was adopted by the Commission in 1993.

CHAPTER III

COUNTERMEASURES

General commentary

(1) Chapter III sets out a series of articles dealing with perhaps the most difficult and controversial aspect of the whole regime of State responsibility, namely countermeasures. 250/ In a decentralized international system lacking compulsory methods for the settlement of most disputes, States resort to unilateral measures of self-help (referred to in these draft articles as countermeasures). Countermeasures take the form of conduct, not involving the use or threat of force, which - if not justified as a response to a breach of the rights of the injured State - would be unlawful as against the State which is subjected to them. 251/ The wrongfulness of acts constituting countermeasures is precluded under article 30. Countermeasures may be necessary in order to ensure compliance with its legal obligations on the part of a wrongdoing State. But at the same time they should not be viewed as a wholly satisfactory legal remedy, both because every State considers itself as, in principle, the judge of its rights in the absence of negotiated or third party settlement, and also because of the unequal ability of States to take or respond to them. In short the system is rudimentary. Recognition in the draft articles of the possibility of taking countermeasures - warranted as such recognition may be in the light of long-standing practice - ought accordingly be subjected to conditions and restrictions, limiting countermeasures to those cases where they are necessary in response to an internationally wrongful act.

(2) Whatever conditions and restrictions may be imposed on them, countermeasures involve a unilateral assessment of, on the one hand, the

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250/ See the discussion of the 1992 debates on countermeasures in the Commission and in the Sixth Committee contained in the fifth report on State responsibility, document A/CN.4/453, paras. 30-36.

251/ Countermeasures are to be distinguished from acts which, although they may be seen as "unfriendly", are not actually unlawful - for example, rupture of diplomatic relations. Such acts of retortion are not dealt with in the present articles.

injured State's right and its infringement and, on the other hand, the legality of the reaction, a reaction which in turn can provoke a further unilateral reaction from the State which has committed the internationally wrongful act. Indeed the potentially negative aspects of countermeasures are such that some members of the Commission questioned the desirability of providing any legal regime of countermeasures within the framework of State responsibility pointing, in particular, to potentially unjust results when applied between States of unequal strength or means. Two considerations pointed, however, in the direction of the inclusion of countermeasures. First, there is sufficient evidence that the practice of countermeasures is admitted under customary international law as a means of responding to unlawful conduct. The Commission had, indeed, already dealt with the question of countermeasures in the context of Part One. Second, one should not underestimate the importance of circumscribing the ability of an injured State to resort to countermeasures, that is to say, of defining the conditions under which countermeasures are a lawful response to unlawful conduct. To include provisions on countermeasures in the present articles is thus both necessary and useful.

Article 47

Countermeasures by an injured State

1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.

2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.

3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State.

Commentary

(1) The basic notion of countermeasures is the entitlement of the injured State not to comply with one or more of its obligations towards the wrongdoing

State. 252/ The fundamental prerequisites for any lawful countermeasures is the existence of an internationally wrongful act, infringing a right of the State taking the countermeasure. 253/ While this does not necessarily require a definitive third party determination of the existence of such an act, a mere good faith belief on the part of the injured State which turns out not to be well-founded would not be sufficient to justify the taking of countermeasures. Thus, an injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for an unlawful act in the event of an incorrect assessment. Although such a good faith belief or mistake on the part of the allegedly injured State may be relevant in evaluating the degree of responsibility, it will not preclude the unlawfulness of the measures taken.

(2) Any decision by an injured State to resort to countermeasures is circumscribed by the permissible functions or aims to be achieved by such measures. 254/ State practice indicates that in resorting to countermeasures the injured State may seek the cessation of the wrongful conduct, as well as reparation in a broad sense. On the other hand, the

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252/ Mr. Riphagen as Special Rapporteur had advocated a distinction between "reciprocal countermeasures" and other measures; see Yearbook ... 1985, vol. II (Part One), p. 10, article 8 and commentary thereto. Reciprocal countermeasures are countermeasures taken in relation to the same obligation or class of conduct as that which is the subject of the initial unlawful act. This category has not been maintained in the draft articles. The essential criterion should be the necessity and proportionality of the particular countermeasure in the circumstances in order to obtain cessation and reparation. To require, in addition, that countermeasures should be reciprocal would operate unequally where, as will often be the case, the injured State is not in a position to take measures of the same description.

253/ While most writers believe that a lawful resort to countermeasures presupposes an internationally wrongful act of an instantaneous or a continuing character, a few scholars seem to believe that resort to measures could be justified even in the presence of a good faith conviction, on the part of the acting State, that it has been or is being injured by an internationally wrongful act. For a detailed discussion of the doctrine, see the third report on State responsibility, document A/CN.4/440, paras. 37 et seq.

254/ The relevant State practice is considered throughout the fourth report on State responsibility, document A/CN.4/444 and Add.1. For a detailed discussion of the doctrine concerning the functions of countermeasures and the aim to be pursued, see the third report on State responsibility, document A/CN.4/440, paras. 39 et seq.

function of countermeasures may not go beyond the pursuit by the injured State of cessation and reparation. Any measures resorted to by an injured State that exceeds those lawful functions or aims would constitute an unlawful act. In particular, an injured State may not take measures in order to inflict punishment on the alleged lawbreaker.

(3) The essence of the injured State's entitlement to take countermeasures is conveyed in article 47 by the words "not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act". This language was considered to be preferable to the phrase "to suspend the performance of" which might restrict the scope of application of countermeasures to obligations of a continuing character and exclude obligations requiring the achievement of a specific result.

(4) In addition to defining the essential element of the notion of countermeasures, article 47 circumscribes the entitlement of the injured State to take countermeasures in three respects. It first requires the failure of the wrongdoing State to comply with its obligations under articles 41 to 46. The sentence is structured so as to place at the very beginning of the article this basic requirement for lawful resort to countermeasures. Secondly, the text makes the injured State's entitlement to take countermeasures subject to the conditions and restrictions set forth in articles 48, 49 and 50. These provide a number of safeguards against abuse. Thirdly, and perhaps most importantly, it requires that resort to countermeasures be "necessary ... in order to induce [the wrongdoing State] to comply with its obligations" under articles 41 to 46. This language is intended to limit the permissible functions or aims of countermeasures and clearly implies that there are cases where resort or continuing resort to countermeasures may not be necessary. More specifically, the term "as necessary" performs a dual function. It makes it clear that countermeasures may be applied only as a last resort where other means not involving non-compliance with the injured State's obligations have failed or would clearly be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicates that the decision of the injured State to resort to countermeasures is to be made reasonably and in good faith, and at its own risk.

(5) The injured State's evaluation of the "necessity" to resort to countermeasures must be made - initially by the injured State itself but also by the wrongdoing State itself and by any involved third party (and see article 58 (2) on arbitration) - "in the light of the response to its demands

by the State which has committed the internationally wrongful act". This language is intended to emphasize the desirability of, and to maximize the opportunity for, dialogue between the injured State and the wrongdoing State. The phrase serves a dual purpose by encouraging the injured State to take due account of the wrongdoing State's response in assessing the need for countermeasures. It is reasonable to expect that in devising its reaction the injured State should take account of the manner in which the wrongdoing State is responding to the injured State's demands for cessation and reparation. The situation created by the wrongful act calls for different reactions according to whether the allegedly wrongdoing State responds to the injured State's demands by a fin de non reçevoir, a curt denial of responsibility or, on the contrary, offers to make adequate and timely reparation or to submit the matter to binding third party settlement or even explains, to the satisfaction of the injured State, that no internationally wrongful act attributable to it was committed.

(6) Requiring the injured State to take into account the extent to which the wrongdoing State's response to its demands is "adequate" 255/ is intended to strike a proper balance between the position of the injured State and that of the wrongdoing State. It seeks to avoid giving the injured State excessive latitude - to the possible detriment of the wrongdoing State - in the use of countermeasures. Countermeasures are only lawful if they are "necessary" in the circumstances. With regard to cessation, the injured State might otherwise apply countermeasures without any opportunity being given to the wrongdoing State to explain, for example, that there has been no wrongful act or that the wrongful act is not attributable to it. By initiating a dialogue and assessing the response of the allegedly wrongdoing State before taking countermeasures, the injured State may avoid committing an internationally wrongful act by taking such measures on the basis of incomplete or inaccurate information. As regards reparation, the wrongdoing State might otherwise continue to be the target of countermeasures even after admitting its responsibility and even while in the process of providing reparation and satisfaction. The necessity of countermeasures diminishes in inverse proportion to the achievement of their legitimate aims. Thus, it is incumbent

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255/ The notion of an "adequate response" is discussed by the Special Rapporteur in his fourth and sixth reports, document A/CN.4/444, paras. 17-23, and document A/CN.4/461, para. 69, respectively.

on the injured State to assess the continuing necessity of the countermeasures in the light of the wrongdoing State's response to its demands.

(7) *Paragraph 2 of article 47* recognizes that the rights of States not involved in the responsibility relationship between the injured State and the wrongdoing State cannot be impaired by countermeasures taken by the former against the latter. The Commission felt that it was appropriate to deal with this matter in the present article rather than article 50 on prohibited countermeasures, since the latter alternative would appear to deny the legitimacy of any countermeasures incidentally affecting the position of third States. This approach was viewed as too sweeping in an interdependent world where States are increasingly bound by multilateral obligations. In the light of those considerations, the Commission opted for ensuring the protection of the rights of third States by relying on one of the essential characteristics of countermeasures, viz., that the unlawful character of conduct resorted to by way of countermeasures is precluded *only as between the injured State and the wrongdoing State*. As stressed by the Commission in paragraph (18) of its commentary to article 30 of Part One of the draft articles, "the legitimate application of a sanction against a given State can in no event constitute *per se* a circumstance precluding wrongfulness of an infringement of a subjective international right of a third State against which no sanction is "justified". 256/

(8) Accordingly, *paragraph 2 of article 47* provides that, if a countermeasure involves a breach of an obligation towards a third State, the wrongfulness of such a breach is not precluded by reason of its permissibility in relation to the wrongdoing State. Paragraph 2 will serve as a warning to the injured State that any measure violating the rights of a third State will be a wrongful act as far as that third State is concerned. This warning is of particular relevance in cases of possible violation by the injured State of rules setting forth *erga omnes* obligations. It will also serve as an encouragement to the injured State to take such precautionary steps as consulting with the third States concerned, weighing the consequences of alternative courses of action and ascertaining that no other choice is available.

256/ *Yearbook ... 1979*, vol. II (Part Two), p. 120, document A/CN.4/SER.A/1979/Add.1 (Part 2), chap. III, sect. B.2.

Article 48

Conditions relating to resort to countermeasures

"1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this Chapter.

2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure."

Commentary

(1) The entitlement to take countermeasures, as delimited in article 47, is subject to certain conditions, qualifications and exclusions, which are spelt out in the following three articles. Specifically, certain conditions relating to the settlement of the dispute apply to lawful countermeasures; these are the subject of article 48. In addition, countermeasures must always be proportionate; this basic requirement is spelt out in article 49. And finally, certain kinds of conduct are excluded entirely from the realm of countermeasures by article 50.

(2) Of these three articles, the most controversial and debated was article 48, that relating to the requirement to pursue the peaceful settlement of the dispute. [257] While the Commission as a whole agreed that negotiations and all other available procedures for the peaceful settlement of disputes should be pursued, there was disagreement as to whether this needed

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[257] For full discussion of State practice and doctrine in relation to the requirement of recourse to other remedies, see Mr. Arangio-Ruiz's fourth report on State responsibility, document A/CN.4/444, pp. 20-33.

to be prior to the taking of countermeasures. The difficulty here is twofold. First, negotiations or other forms of dispute settlement can be lengthy, and could be almost indefinitely drawn out by a State seeking to avoid the consequences of its wrongful act. Secondly, some forms of countermeasures (including some of the most readily reversible forms, for example, the freezing of assets) can only be effective if taken promptly. For these reasons it was felt that to require as a precondition to countermeasures the exhaustion of all the procedures available in accordance with Article 33 of the United Nations Charter would put the injured State at a disadvantage. Rather than requiring the exhaustion of all available procedures as a precondition, article 48 focuses on making available to a State which is a target of countermeasures an appropriate and effective procedure of resolving the dispute. Moreover it allows the allegedly wrongdoing State to require a suspension of the countermeasures if that State cooperates in good faith in a binding third party dispute settlement mechanism, and even though that State may continue to contest that its initial act was unlawful. But on the other hand, it does require that the injured State, before taking countermeasures, should seek to resolve the problem through negotiations. This requirement is, however, without prejudice to the taking of urgent interim or provisional measures required to preserve the rights of the injured State. Certain members of the Commission held the view that an injured State's obligation to negotiate, prior to taking countermeasures, as provided in paragraph 1 of this article does not apply in the case of international crimes, especially in the case of genocide.

(3) This essential and central element to the articles on countermeasures, viz., the obligation to pursue a resolution of the dispute, is given effect to in a graduated way, based on a distinction between initial measures taken in response to the unlawful act by way of "interim measures of protection", and other countermeasures. As soon as an allegedly wrongful act has come to its notice, the injured State may find it necessary to take measures to preserve its legal rights. At the same time the Commission eventually concluded that full-scale countermeasures should not be taken without an initial attempt to resolve the dispute by negotiation. Paragraph 1 strikes the balance between these considerations in the following way. On the one hand, the injured State is under an obligation, pursuant to article 54, to seek to settle the dispute by negotiation with the other State concerned at its request. On the other hand, and notwithstanding this obligation, it is immediately entitled to take

interim measures of protection which otherwise comply with the requirements of this Chapter and which are necessary to preserve its legal position, pending the outcome of the negotiations provided for in article 54.

(4) The term "interim measures of protection" is inspired by procedures of international courts or tribunals which have or may have power to issue interim orders or otherwise to indicate steps that should be taken to preserve the respective rights of the parties in dispute. The difference here however is that at the relevant time - immediately upon the occurrence of the wrongful act - no such court or tribunal with jurisdiction over the dispute may exist. Moreover some measures have to be taken immediately or they are likely to be impossible to take at all - for example, the freezing of assets (which can be removed from the jurisdiction within a very short time). A feature of such interim measures in the sense of the present paragraph is that they are likely to prove reversible should the dispute be settled: the comparison is between the temporary detention of property and its confiscation, or the suspension of a licence as against its revocation.

(5) The extent of the obligation to negotiate during this first phase is not subject to any specific time-limit. What is a reasonable time for negotiations depends on all the circumstances, including the attitude of the wrongdoing State, the urgency of the issues at stake, the likelihood that damages may increase if a speedy resolution is not achieved, etc. Given this diversity of situations, to fix a specific time-limit would be impracticable.

(6) If it becomes clear that negotiations are unlikely to succeed, countermeasures may be taken which go beyond interim measures of protection in the sense explained above, although they must none the less comply with the various requirements of Chapter III. In particular, paragraph 2 of article 48 makes it clear that existing third party dispute settlement mechanisms remain in force notwithstanding a dispute which has given rise to countermeasures, and that the injured State itself must continue to comply with its obligations in relation to dispute settlement. Thus a State is not entitled, by way of countermeasures, to suspend or not comply with obligations in relation to dispute settlement. Such obligations have a distinct legal character and practical purpose, and must remain in force even in a context of worsening relations. 258/

258/ Cf. United States Diplomatic and Consular Staff in Tehran ICJ Reports 1980 p. 3, p. 28.

(7) In addition to preserving "any other binding dispute settlement procedure in force" between the States concerned (such as, for example, their mutual acceptance of the Optional Clause, Article 36 (2) of the Statute of the International Court of Justice, in relation to the dispute or an arbitration clause in a bilateral treaty), paragraph 2 of article 48 also refers to the dispute settlement obligations arising under Part Three of the present articles. The reference to Part Three has particular significance for disputes arising in the context of countermeasures, since under paragraph 2 of article 58, where a dispute "arises between States Parties to the present articles, one of which has taken countermeasures against the other", the allegedly wrongdoing State - i.e. the State the subject of the countermeasures - may at any time unilaterally submit the dispute to an arbitral tribunal to be constituted in conformity with annex II. Thus where a State takes countermeasures under article 48, it thereby in effect offers to the allegedly wrongdoing State the opportunity to resolve their dispute by a binding third party procedure of arbitration. And this is the case even if there is no other binding third party dispute settlement obligation in force between them.

(8) In this context, paragraph 3 of article 48 uses the term "a tribunal which has the authority to issue orders binding on the parties". The reference here is to orders which are binding on the parties as to the substance of the dispute. The tribunal must also have power to order interim measures of protection.

(9) In practice the two issues (the legality of the initial conduct and the legality of countermeasures) are likely to be intertwined. The jurisdiction of the tribunal would not be excluded merely because the State party taking the countermeasure refrained from qualifying its conduct as a "countermeasure". The jurisdiction of an arbitral tribunal under article 58, paragraph 2 arises in respect of any dispute "between States Parties to the present articles, one of which has taken countermeasures against the other". Whether a particular measure constitutes a countermeasure is an objective question: as explained in paragraph (3) of the commentary to article 47, it is not sufficient that the allegedly injured State has a subjective belief that it is (or for that matter is not) taking countermeasures. Accordingly, whether a particular measure in truth was a countermeasure would be a

preliminary issue of jurisdiction for the arbitral tribunal under article 58, paragraph 2, and in accordance with general principle would be a matter for the tribunal itself to determine. 259/

(10) Resort to binding third party dispute settlement in disputes in which countermeasures have been taken has several effects. In the first place, and most importantly, it provides a procedure for the resolution of the dispute, even in cases where no such procedure was otherwise available. But in addition, pursuant to paragraph 3 of article 48, the right of the injured State to continue to take countermeasures is suspended while the dispute settlement procedure is being implemented. The only conditions precedent to the suspension are, first, that the internationally wrongful act must have ceased (i.e. the injured State is not suffering a continuing injury as a result of a continuing wrongful act), and, secondly, that the wrongdoing State is implementing the dispute settlement procedure in good faith. Reference to a dispute settlement procedure has this suspensive effect if it involves submission to "a tribunal which has the authority to issue orders binding on the parties"; this is true, for example, of the International Court of Justice, as well as of the arbitral tribunal provided for in article 58 of the present articles.

(11) To summarize, if the basic conditions for countermeasures laid down in article 47 are met, and if initial negotiations have failed to produce a solution the injured State may take countermeasures without any prior resort to third party dispute settlement procedures. But if it does take countermeasures, the State against whom they are taken may resort to binding arbitration under article 58, paragraph 2, or to other applicable binding third party settlement of the dispute. If the allegedly wrongdoing State does resort to such a procedure, and implements it in good faith, and provided the wrongful act itself has ceased, the countermeasures must be suspended.

(12) There is, however, one further necessary refinement to the procedural system embodied in article 48. Although the injured State must suspend countermeasures pending good faith submission to binding third party dispute settlement, the question of interim measures of protection may arise, and the injured State should not be left without a remedy if the wrongdoing State fails to comply with any orders or indications issued by the court or tribunal

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259/ The issues raised in paragraph (9) are discussed more fully in the commentary to article 58 on arbitration where this paragraph would eventually move.

for interim measures of protection. Thus paragraph 4 of article 48 provides that a failure by the wrongdoing State to honour a request or order emanating from the court or tribunal concerned "shall terminate the suspension of the right of the injured State to take countermeasures". This would be so even if the request or order emanating from the court or tribunal is technically non-binding. However, a failure by the wrongdoing State to comply with an indication of interim or provisional measures, although it may render it liable to a resumption of the countermeasures, has no other specific effect. In particular, the court or tribunal retains its jurisdiction over the dispute, and its procedures remain available to deal with the dispute so far as both parties are concerned.

(13) In the Commission's view, this system marks an important advance on the existing arrangements for the resolution of disputes involving countermeasures. It gives the parties, in addition to all existing possibilities for the resolution of their dispute by diplomatic or other means, the option of resolution of the dispute by arbitration, and of thereby avoiding the aggravation of the dispute and of their relations which continuing countermeasures can produce. In the longer term it will reduce that element of the system of countermeasures which tended to a spiralling of responses.

(14) As noted, the effect of paragraph 2 of article 48 is to preserve existing binding dispute settlement procedures as well as to provide the additional procedure envisaged in article 58, paragraph 2 at the election of the State which is the subject of countermeasures. Article 48 does not specify any priority as between two or more applicable procedures for binding dispute settlement, leaving it to the agreement of the parties (expressed in advance or ad hoc) or the decision of the tribunals concerned to resolve any problem of overlap.

CHAPTER IV

INTERNATIONAL CRIMES

Article 51

Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.

Commentary

(1) This article is essentially a chapeau to Chapter IV. The effect of the introduction of article 19 of Part One has been to recognize a category of wrongful acts to which, because of their seriousness, special consequences should attach. Whether that category is called "crimes", or "exceptionally grave delicts" is immaterial in the sense that, however termed, special consequences should attach: otherwise there is no point in distinguishing this category from other internationally wrongful acts. Some members maintained their reservation about the utility or the wisdom of the concept of crime by a State.

(2) An initial problem facing the Commission was to decide how this distinction should be made or by whom. The Commission considered a variety of innovative proposals to overcome this difficulty but finally decided to confine itself to the mechanisms for dispute settlement in Part Three and to the provision of article 39 "Relationship to the Charter of the United Nations".

(3) Thus, in the first instance it would be for the injured State or States to decide that a crime had been committed. This view would be reflected in their demands for reparation for, as article 52 provides, they would be free of certain limitations applying in respect of ordinary delicts as regards their entitlements to both restitution and satisfaction. The Commission would expect the injured States to make clear their view that the conduct they complained of constituted a crime in claiming reparation, if not in earlier protests.

(4) As regards the obligations imposed on all States under article 53 (Obligations of non-recognition, etc.) these would arise for each State as and when it formed the view that a crime had been committed. Each State would bear responsibility for its own decision although, it may be added, there may be cases in which the duty of non-recognition, or the duty of non-assistance, for example, might flow from mandatory resolutions of the Security Council or from other collective actions duly taken.

(5) In any event, if the wrongdoing State chose to challenge the decisions of other States that it had committed a crime, then a dispute would arise. That dispute could then be pursued via the procedures for settlement of disputes in Part Three. The options of negotiations, conciliation, arbitration - or, indeed, reference to the International Court of Justice under its existing Statute - would all be available to the State accused of the crime.

(6) The Commission recognizes that the State so accused might seek a speedier resolution of its dispute than the procedures in Part Three would allow, particularly recourse to those in the Charter of the United Nations.

(7) Nevertheless, it should be pointed out that a number of members of the Commission favoured different proposals. The Commission believes Member States should be aware of these proposals and comment on them specifically should they so wish. In the event that either proposal received wide support, the Commission could return to it during the second reading.

(8) One such proposal was that contained in the draft articles submitted by the Special Rapporteur in his seventh report (1995) and referred by the Commission to the Drafting Committee following the debate on that report. 260/

(9) Another such proposal envisaged two stages. In the first stage either party could require the Conciliation Commission to state in its final report whether there was prima facie evidence that a crime had been committed. This would require an addition to article 57.

(10) An affirmative view by the Conciliation Commission would "trigger" the second stage, allowing either party unilaterally to initiate arbitration. This could be achieved by amending article 58, in effect making arbitration compulsory for crimes, as for countermeasures.

(11) The first stage would act like a filter, preventing abuse, and the second stage involving compulsory arbitration could bear a certain analogy to the requirement of compulsory jurisdiction for the International Court of Justice over disputes arising from pleas of jus cogens under articles 53 or 64 of the Vienna Convention on the Law of Treaties.

(12) The proposals dealt with in the preceding paragraphs (8 to 11) envisaging a two-step procedural mechanism for determining disputes as to whether a crime has been committed are based on the idea that such disputes are too important to be left to the general procedures of Part Three. In order to avoid any possible abuse, these proposals provided that disputes to which the application of article 19 might give rise should be submitted to an impartial third party with decision-making power.

(13) On the other hand, some members of the Commission felt that the analogy with jus cogens under article 66, subparagraph (a) of the Vienna Convention on

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260/ Document A/CN.4/469, Corr.1 and Adds.1 and 2. See also fifth report, document A/CN.4/453, Adds.2 and 3.

the Law of Treaties, referred to in paragraph (11), should be taken to its conclusion, and that the only appropriate body to fulfil this task was the International Court of Justice, a principal organ of the United Nations, to whose Statute virtually all States are parties, and in whose proceedings other States could intervene. Others found the analogy to jus cogens misleading and unconvincing.

(14) Particular consequences of crimes are of two kinds. The first, which is dealt with in article 52, concerns the relationship between the wrongdoing State and each injured State, it being recalled that under article 40 (2) (g) all other States are defined as "injured States" for this purpose. The second concerns what may be described as the minimum collective consequences of a crime and is dealt with in article 53.

Article 52

Specific consequences

> Where an internationally wrongful act of a State is an international crime:
>
> (a) an injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;
>
> (b) an injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Commentary

(1) The specific consequences for the relationship between a wrongdoing State and an injured State in the context of crimes are, for the most part, adequately expressed in articles 41 to 45 dealing with reparation. Of course, the application of those articles to the gravest breaches of international law, such as crimes, will entail serious consequences: it is simply that for the most part the formulation of articles 41 to 45 is adequate to respond to the most serious, as well as lesser breaches of international law.

(2) In two respects, however, the limitations imposed on reparation by articles 41 to 45 seem to be inappropriate in the case of international crimes and some adjustment is necessary. These adjustments concern article 43 (restitution in kind) and article 45 (satisfaction).

(3) As to restitution in kind, there are two limitations on the entitlement of an injured State to this remedy, contained in subparagraphs (c) and (d) of paragraph 1 of article 43, which the Commission believes ought not to apply in

the case of a crime. The first, in subparagraph (c) normally limits the entitlement to restitution where the wrongdoing State can show that to grant restitution (as opposed to an award of compensation) would impose on it, the wrongdoing State, a burden disproportionate to the benefit secured by the injured State in obtaining restitution. The Commission believes this limitation ought to be removed in the case of a crime. Restitution is essentially the restoration of the situation as it existed prior to the unlawful act, and the Commission believes a wrongdoing State ought never to be able to retain the fruits of its crime, or benefit from a wrongdoing that is a crime, however painful or burdensome restoration might be.

(4) The Commission would emphasize that, in removing this limitation it is not eliminating "proportionality" which, as a general concept, pervades the whole field of remedies. In the Commission's view, the restoration of the original situation can hardly be said to be "disproportionate" in the majority of cases, and should never be so regarded in the case of crimes.

(5) The second limitation, in subparagraph (d) of article 43, excludes restitution where this would "seriously jeopardize the political independence or economic stability" of the wrongdoing State. The Commission does not believe this to be a valid reason for refusing restitution when the wrongdoing State is being required to give up the results of a crime.

(6) As to satisfaction, the effect of paragraph 3 of article 45 is to exclude demands for satisfaction which would "impair the dignity of" the wrongdoing State. The Commission would exclude this limitation in relation to satisfaction for a crime simply because, by reason of its crime, the wrongdoing State has itself forfeited its dignity. The Commission would note, however, that the limitation in paragraph 2 (c) would remain, so that a claim for damages would have to remain proportionate to the gravity of the crime.

(7) The Commission sees no need to alter or qualify the other legal consequences of crimes as formulated in articles 41 to 45. The obligation of cessation must apply equally to wrongful acts and crimes. So, too, must the obligation to make full reparation. The Commission equally has no doubts that the injured State's entitlement to compensation should be unaffected. Thus articles 41, 42 and 44 would appear to require no modification.

(8) The Commission wondered whether "punitive damages" or "exemplary damages" may be appropriate in the case of a crime. According to some members article 45, on satisfaction, already allows for this possibility in so far as satisfaction may include "in cases of gross infringement of the rights of the

injured State, damages reflecting the gravity of the infringement". And, finally, the entitlement to an assurance or guarantee of non-repetition is appropriate to both crimes and other wrongful acts.

Article 53

Obligations for all States

> An international crime committed by a State entails an obligation for every other State:
>
> (a) not to recognize as lawful the situation created by the crime;
>
> (b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
>
> (c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and
>
> (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

Commentary

(1) By virtue of this text obligations are imposed on all States and the involvement of all States is believed to reflect the interest of all States in the prevention and suppression of international crimes which, by definition (in article 19), impair "fundamental interests of the international community".

(2) The obligations are both negative and positive. In the first category there are obligations of non-recognition and obligations to refrain from assisting the wrongdoing State: these are contained in paragraphs (a) and (b). These reflect an already well-established practice. The requirement of non-recognition can be seen, for example, in Security Council resolutions on Rhodesia (e.g. Security Council resolution 216 (1965)) and on Kuwait (e.g. Security Council resolution 661 (1990)). The obligation not to aid or assist a wrongdoing State finds reflection in Security Council resolutions on South Africa (e.g. Security Council resolution 301 (1971), 418 (1977) and 569 (1985)) and on Portuguese colonial territories (e.g. Security Council resolution 218 (1965)). Assistance to a State committing a crime would itself be an unlawful act, and is therefore properly prohibited.

(3) In the second category are the positive obligations to cooperate with other States in carrying out their obligations under (a) and (b), and in any measures they may take to eliminate the consequences of a crime. All these

obligations rest on the assumption of international solidarity in the face of an international crime. They stem from a recognition that a collective response by all States is necessary to counteract the effects of an international crime. In practice, it is likely that this collective response will be coordinated through the competent organs of the United Nations - as in the case of the resolutions referred to above. It is not the function of the present draft articles to regulate the extent or exercise of the constitutional power and authority of Charter organs - nor, in view of Article 103 of the Charter, is it even possible to do so. But apart from any collective response of States through the organized international community, the Commission believes that a certain minimum response to a crime is called for on the part of all States. Article 53 is drafted so as to express this minimum requirement, as well as to reinforce and support any more extensive measures which may be taken by States through international organizations in response to a crime.

CHAPTER IV

STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

A. Introduction

67. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons". 261/ The General Assembly endorsed the Commission's decision in paragraph 7 of resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly. At its forty-sixth session, in 1994, the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic. 262/ In paragraph 6 of its resolution 49/51 of 9 December 1994, the General Assembly endorsed the intention of the Commission to undertake work on the topic, on the understanding, once again, that the final form to be given to the work shall be decided after a preliminary study is presented to the Assembly.

68. At its forty-seventh session, the Commission had before it the Special Rapporteur's first report (A/CN.4/467). Following its consideration of the report, the Commission established a Working Group on the topic entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action. 263/ The Working Group submitted a report to the Commission, containing a number of preliminary conclusions regarding the impact of State succession on the nationality of natural persons. 264/ The Commission decided, on the recommendation of the Special Rapporteur, to reconvene the Working Group at the forty-eighth

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261/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), para. 440.

262/ Ibid., Forty-ninth session, Supplement No. 10 (A/49/10), para. 383.

263/ Ibid., Fiftieth session, Supplement No. 10 (A/50/10), para. 147. For the composition of the Working Group, see para. 8 above.

264/ Ibid., Annex.

session to complete its task, which will enable it to meet the request contained in paragraph 6 of General Assembly resolution 49/51. 265/

B. Consideration of the topic at the present session

1. Consideration of the second report of the Special Rapporteur

69. At the present session, the Commission had before it the Special Rapporteur's second report (A/CN.4/474 and Corr.1 and Corr.2 (Chinese only)), which it considered at its 2435th and 2451st meetings, held on 4 June and 2 July 1996.

70. The Special Rapporteur observed that the purpose of the report was to enable the Commission to complete the preliminary study of the topic and thus comply with the request of the General Assembly. The report was, in particular, designed to facilitate the task of the Working Group on the topic in its preliminary consideration, at the present session, of the questions of the nationality of legal persons, the choices open to the Commission when it would embark on the substantive study of the topic, and a possible timetable.

71. The Special Rapporteur had thought it useful to present a broad picture of State practice, from the nineteenth century to the recent past, in all regions of the world, and regarding different types of territorial changes. He had refrained from analysing such practice, believing that this exercise would form part of the substantive study the Commission would undertake if invited to do so by the General Assembly.

72. The report was divided into an introduction (Chap. I) and three substantive sections. Chapter II dealt with the nationality of natural persons, and attempted to summarize the results of the work already undertaken on that aspect of the topic, to classify the problems in broad categories and to suggest material for analysis at a later stage of the Commission's work. The Special Rapporteur stressed the importance he attached to the views expressed in the Sixth Committee on each of the following specific issues discussed in that Chapter: the obligation to negotiate in order to resolve by agreement problems of nationality resulting from State succession; the granting of the nationality of the successor State; the withdrawal or loss of the nationality of the predecessor State; the right of option; the criteria used for determining the relevant categories of persons for the purpose of granting or withdrawing nationality or for recognizing the right of option;

265/ Ibid., para. 229.

non-discrimination; and the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality.

73. The Special Rapporteur expressed the view that, as far as the problem of nationality of natural persons was concerned, it could generally be inferred that his first report, the preliminary report of the Working Group and the debates in the Commission and the Sixth Committee provided all the elements necessary to complete a preliminary study of that aspect of the topic.

74. That was not yet the case with the other aspect, i.e. the nationality of legal persons, which was addressed in Chapter III, and which should be the main focus of the Working Group at the present session. The Special Rapporteur had attempted to outline the scope and characteristics of the subject and to bring out its many and considerable complexities, including the various forms that legal persons could take. He observed that, apart from State succession, the problem of the nationality of legal persons arose mainly in the areas of conflicts of laws, the law on aliens and diplomatic protection as well as in relation to State responsibility.

75. The Special Rapporteur pointed out that views had been divided both in the Commission and in the Sixth Committee as to whether a more in-depth consideration of this aspect should be undertaken at the present stage. He himself had expressed, at the previous session of the Commission, his preference at that stage for putting that issue aside and for focusing on the nationality of natural persons, but as the Commission had requested more information for the debate, he had felt compelled to respond accordingly.

76. In Chapter IV, containing recommendations concerning future work on the topic, the Special Rapporteur suggested again to divide the subject into two parts, focusing first on the nationality of natural persons. He also recommended that the Commission leave the question of the rule of the continuity of nationality for further consideration in the framework of the topic of diplomatic protection, should the latter be included in the Commission's agenda. As to the working methods, the Special Rapporteur had nothing to add to what he had already said in his first report with regard to the adoption of an approach involving both codification and progressive development of international law, the terminology used, the categories of State succession and the scope of the problem. The Working Group could review those elements and make relevant proposals to the plenary.

77. As to the form which the outcome of the work might take, the Special Rapporteur indicated his preference for elaborating a declaration of the General Assembly consisting of articles accompanied by commentaries. If the Commission agreed with that approach, it might be able to complete its first reading of all the articles and the commentaries in the course of the next session, an option which could also be discussed in the Working Group.

2. Consideration of the topic by the Working Group

78. At the 2451st and 2459th meetings, on 2 and 12 July 1996, the Chairman of the Working Group on the topic, the Special Rapporteur, presented an oral report to the plenary on the work undertaken by the Group at the present session.

79. The Working Group held five meetings between 4 June and 2 July 1996, focusing on the following issues: the problem of the nationality of legal persons, the form that the work on the topic should take and the calendar of work. It had also embarked on a more in-depth analysis of the question of the nationality of natural persons in situations of State succession.

80. The Working Group recommended to the Commission that consideration of the question of the nationality of natural persons be separated from that of the nationality of legal persons, as they raised issues of a very different order. Whilst the first aspect of the topic involved the basic human right to a nationality, so that obligations for States stemmed from the duty to respect that right, the second aspect involved issues that were largely economic and centred around a right to establishment which may be claimed by a corporation operating in the territory of a State involved in succession. The Working Group felt, moreover, that these two aspects did not need to be addressed with the same degree of urgency.

81. The Working Group considered that the question of the nationality of natural persons should be addressed as a matter of priority, and concluded that the result of the work on the subject should take the form of a non-binding instrument consisting of articles with commentaries. The first reading of such articles could be completed during the forty-ninth, or, at the latest, the fiftieth session of the Commission.

82. Upon completion of the work on the nationality of natural persons, the Commission would take a decision, based on comments requested from States, on the need to consider the question of the impact of State succession on the nationality of legal persons.

83. The Working Group further recommended to the Commission that it undertake the substantive study of the subject under the title "Nationality in relation to the succession of States".

84. With respect to the question of the nationality of natural persons in situations of State succession, the Working Group had focused on the issue of the structure of a possible future instrument on the matter and the main principles to be included therein and based its discussion on a working paper prepared for this purpose by its Chairman.

85. It was envisaged that the future instrument would be divided into two parts: Part I, dealing with the general principles concerning nationality in all situations of State succession, and Part II, containing rules directed at specific situations of State succession.

86. Part I would include several basic principles to be observed by "States concerned", i.e. the States involved in the State succession - the predecessor and successor States, or the successor States, as the case may be:

(a) the right of every individual who had the nationality of the predecessor State on the date of the succession of States to the nationality of at least one of the States concerned;

(b) the corollary obligation of States concerned to avoid that persons who, on the date of the succession of States, had the nationality of the predecessor State and had their habitual residence on the respective territories of the States concerned, become stateless as a result of such succession;

(c) the obligation to enact promptly national legislation concerning nationality and other connected issues arising in relation with State succession and to ensure that individuals concerned would be apprised, within a reasonable time period, of the effect of such legislation on their nationality and the consequences of a possible exercise of an option on their status;

(d) the obligation of States concerned, without prejudice to their policy in the matter of multiple nationality, to give consideration to the will of individuals whenever they equally qualified, either in whole or in part, to acquire the nationality of two or several such States;

(e) the principle of non-discrimination, in accordance with the relevant conclusions reached by the Working Group at the previous session; 266/

(f) the prohibition of arbitrary decisions concerning the acquisition and withdrawal of nationality and the exercise of the right of option;

(g) the obligation that relevant applications be issued promptly and that decisions be issued in writing and open to administrative or judicial review;

(h) the obligation to take all necessary measures to ensure the protection of the basic human rights and freedoms of persons having their habitual residence on the territory or otherwise under the jurisdiction of such States during the interim period between the date of the succession of States and the date when their nationality would be determined;

(i) the obligation that a reasonable time-limit be granted to comply with a requirement to transfer one's residence out of the territory of a State concerned following the voluntary renunciation of that State's nationality, whenever such requirement is contained in the legislation of that State;

(j) the obligation to adopt all reasonable measures to enable a family to remain together or to be reunited, whenever the application of their internal law or of treaty provisions would infringe on the unity of such family;

(k) the obligation of States concerned to consult and negotiate in order to determine whether the State succession had any negative consequences with respect to the nationality of individuals and other related aspects of their status, and, if so, to seek a solution of these problems through negotiations;

(l) the rights and obligations of States other than the States concerned when confronted with cases of statelessness resulting from non-compliance by the latter with the provisions of the future instrument.

87. In order to facilitate negotiations between States concerned, Part II would contain a set of other principles setting forth more specific rules for the granting or withdrawal of nationality or the granting of the right of option in different cases of State succession. They would be based on the conclusions reached by the Working Group at the previous session.

266/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), Annex.

3. Action by the Commission

88. At the 2459th meeting, on 12 July 1996, the Commission decided, in accordance with the Working Group's conclusions, to recommend to the General Assembly that it should take note of the completion of the preliminary study of the topic and that it request the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States", on the understanding that:

(a) consideration of the question of the nationality of natural persons will be separated from that of the nationality of legal persons and that priority will be given to the former;

(b) for present purposes - and without prejudicing a final decision - the result of the work on the question of the nationality of natural persons should take the form of a declaration of the General Assembly consisting of articles with commentaries;

(c) the first reading of such articles should be completed during the forty-ninth, or, at the latest, the fiftieth session of the Commission;

(d) the decision on how to proceed with respect to the question of the nationality of legal persons will be taken upon completion of the work on the nationality of natural persons and in light of the comments that the General Assembly may invite States to submit on the practical problems raised by a succession of States in this field.

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

89. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur. [267]

90. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. [268] The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

91. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline [269] and a study prepared by the

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[267] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see Yearbook ... 1978, vol. II (Part Two), pp. 150-152.

[268] For the five reports of the Special Rapport, see Yearbook ... 1980, vol. II (Part One) p. 247, document A/CN.4/334 and Add.1 and 2; Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; Yearbook....1982, vol. II (Part One), p. 51, document A/CN.4.360; Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373; Yearbook ... 1984, vol. II (Part One) p. 155, document A/CN.4/383 and Add.1.

[269] Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 270/

92. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza, Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-eighth session (1996). 271/

93. At its fortieth session (1988), the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General Provisions) and Chapter II (Principles). 272/ The Commission deferred consideration of the tenth and eleventh reports of the Special Rapporteur and instead concentrated work on the articles of this topic already before the Drafting Committee which had before it the following draft

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270/ *Yearbook ... 1985*, vol. II (Part One) Addendum, document A/CN.4/384.

271/ For the 12 reports of the Special Rapporteur, see:

Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394;
Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402;
Yearbook ... 1987, vol. II (Part One) p. 47, document A/CN.4/405;
Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413;
Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423;
Yearbook ... 1990, vol. II (Part One), p. 83, document A/CN.4/428;
Yearbook ... 1991, vol. II (Part One), p. 71, document A/CN.4/437;
Yearbook ... 1992, vol. II (Part One), p. 75, document A/CN.4/443;
Yearbook ... 1993, vol. II (Part One), document A/CN.4/450;
document A/CN.4/459; document A/CN.4/468; and document A/CN.4/475
and Add.1.

272/ For the text, see *Yearbook ... 1988*, vol. II (Part Two), p. 9. At its forty-first session (1989), the Commission also referred to the Drafting Committee the revised version of those articles which had already been referred to the Drafting Committee at the previous session. See *Yearbook ... 1989*, vol. II (Part Two), para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10* (A/45/10), para. 471.

articles: draft articles 1 to 10 for Chapter I (General provisions) and Chapter II (Principles); 273/ and a draft which numbered as article 10 (non-discrimination) to article 20 bis. 274/

94. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. 275/ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992 decided to continue the work on this topic in stages. First to complete work on prevention of transboundary harm and to proceed with remedial measures. 276/ The Commission decided that, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title.

95. At its forty-sixth (1994) and forty-seventh sessions (1995), the Commission provisionally adopted on first reading the following draft articles with commentaries thereto: 1 (scope of the present articles); 2 (use of terms); 11 (prior authorization); 12 (risk assessment); 13 (pre-existing activities); 14 (measures to prevent or minimize the risks); 14 bis [20 bis] (non-transference of risk); 15 (notification and information); 16 (exchange of information); 16 bis (information to the public); 17 (national security and industrial secrets); 18 (consultations on preventive measures); 19 (rights of the State likely to be affected); 20 (factors involved in an equitable balance

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273/ The articles are found in Yearbook ... 1988, vol. II (Part One) p. 251, document A/CN.4/413 and were referred to the Drafting Committee at the fortieth session in 1998.

274/ The articles are found in Yearbook ... 1993, vol. II (Part One), document A/CN.4/450 and referred to the Drafting Committee at the forty-fifth session in 1993.

275/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10) pp. 127-129.

276/ For a detailed recommendation of the Commission, see Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10) pp. 196-198.

of interests); article A [6] (freedom of action and the limits thereto); article B [8 and 9] (prevention); article C [9 and 10] (liability and reparation); and article D [7] (cooperation). 277/

B. Consideration of the topic at the present session

96. At the present session the Commission had before it the twelfth report of the Special Rapporteur 278/ which he introduced at the 2450th meeting on 28 June 1998. The report reviewed the various liability regimes proposed by the Special Rapporteur in his previous reports. The Commission also had before it a Secretariat study entitled "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law" (A/CN.4/471).

1. Establishment of the Working Group

97. The Commission at its 2450th meeting on 28 June 1996 decided to establish a Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations to the Commission. 279/

2. Outcome of the work carried out by the Working Group

98. The Working Group referred to in paragraph 9 above submitted a report which was introduced by its Chairman at the 2465th and 2471st meetings of the Commission on 19 and 25 July 1996. The report of the Working Group is annexed to the present report.

99. The Commission considered that the report of the Working Group represented a substantial advance on the work on the topic. It presented a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto. Though the Commission was not able to examine the draft articles at the current session, it felt that, in principle, the proposed draft articles provided a basis for examination by the General Assembly at its fifty-first session.

100. The Commission would welcome comments by the General Assembly on the question referred to in paragraph (26) of commentary to article 1, the

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277/ Articles 1, 2, 11 to 20 were adopted in 1994 and articles A to D were adopted in 1995.

278/ Document A/CN.4/475.

279/ For the Composition of the Working Group see para. 9 above.

approach to the issue of compensation or other relief as set out in Chapter III, as well as on the draft articles contained in the report of the Working Group. Comments which Governments may wish to make in writing would also be welcome. These comments shall provide a useful guidance for the subsequent work of the Commission on this topic that it proposes to take up in accordance with its normal procedure.

101. The Commission expressed its deep appreciation to Mr. Julio Barboza, for the zeal and competence which he demonstrated for 12 years as Special Rapporteur for this important and complex topic.

CHAPTER VI

RESERVATIONS TO TREATIES

A. Introduction

102. The General Assembly, in resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its programme of work at its forty-sixth session (1994) the topic "The law and practice relating to reservations to treaties".

103. At its forty-sixth session, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic. [280]

104. At its forty-seventh session, the Commission received the first report of the Special Rapporteur on the topic. [281] It considered the report at its 2400th to 2404th meetings, at its 2406th and 2407th meetings and at its 2412th and 2416th meetings.

105. The Special Rapporteur summarized as follows the conclusions he drew from the Commission's discussion of the topic at the forty-seventh session:

(a) The Commission considered that the title of the topic should be amended to read: "Reservations to treaties";

(b) The Commission should adopt a guide to practice in respect of reservations. In accordance with the Commission's Statute and its usual practice, this guide would take the form of draft articles whose provisions would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements should be interpreted with flexibility and, if the Commission felt that it must depart from them substantially, it could submit new proposals to the General Assembly on the form that the results of the work might take;

(d) There was a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.

106. These conclusions constituted, in the view of the Commission, the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. In the

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[280] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[281] Document A/CN.4/470 and Corr.1.

Commission's opinion, the model clauses on reservations, to be inserted in multilateral treaties, should be designed to minimize disputes in the future.

107. Again, at its 2416th meeting, on 13 July 1995, the Commission, in accordance with its earlier practice, 282/ authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. This questionnaire would be sent to the addressees by the Secretariat.

B. Consideration of the topic at the present session

108. At the present session, the Commission had before it the Special Rapporteur's second report on the topic. 283/ The Special Rapporteur introduced his report to the Commission at its 2460th meeting, held on 16 July 1996.

109. The report consisted of two quite separate chapters.

110. Chapter I, "Overview of the study", was on the Commission's future work on the topic of reservations to treaties and proposed a provisional general outline of the study. Chapter II, "Unity or diversity of the legal regime of reservations to treaties" dealt, on the one hand, with the legal regime for reservations and substantive rules applicable to reservations in general, and on the other hand, with the application of this general regime to human rights treaties. A bibliography on reservations to treaties was annexed to the report.

111. In chapter I, the Special Rapporteur recalled the conclusions of his first report as well as the detailed questionnaire he had prepared on reservations to treaties, so as to inquire into the practice of, and problems encountered by, States. Fourteen States had so far answered the questionnaire. In chapter I, the Special Rapporteur indicated the area covered by the study. Five major problems of substance had predominated in the discussion that had followed the presentation of the first report:

(i) The definition of reservations, the distinction between them and interpretative declarations and the differences of legal regime which characterize the two institutions;

282/ See Yearbook ... 1993, vol. II (Part Two), para. 286.

283/ A/CN.4/477 and A/CN.4/477/Add.1.

(ii) The doctrinal quarrel (which has, however, important practical consequences) between the "permissibility" and "opposability" schools, which had a bearing, eventually, on what could probably be considered prima facie as the main problem raised by the subject: conditions for the permissibility and opposability of reservations;

(iii) The settlement of disputes;

(iv) The effects of the succession of States on reservations and objections to reservations;

(v) The question of the unity or diversity of the legal regime applicable to reservations based on the object of the treaty to which they are made.

112. Significantly, quite striking agreement was found, further to the discussion in the Sixth Committee, between the members of the Commission and the representatives of States in regard to the hierarchy of the problems posed - or left pending - by the present legal regime of reservations to treaties. The main topics that caused difficulty were the following:

(i) The question of the very definition of reservations;

(ii) The legal regime governing interpretative declarations;

(iii) Objections to reservations; and

(iv) The rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties.

113. The Special Rapporteur recalled the form to be taken by further study of the topic, which should preserve the achievements of the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions and lead, if need be, to a "guide to practice in respect of reservations". Such a guide, if it was to be of any real value to States and international organizations, should be divided into chapters, in the following form:

(i) Review of the relevant provisions of the 1969, 1978 or 1986 Vienna Conventions;

(ii) Commentaries to those provisions, bringing out their meaning, scope and ambiguities or gaps;

(iii) Draft articles aimed at filling the gaps or clarifying the ambiguities,

- commentaries to the draft articles;

(iv) Model clauses which could be incorporated, as appropriate, in specific treaties and derogating from the draft articles;

- commentaries to the model clauses.

114. The provisional general outline envisaged by the Special Rapporteur would consist in principle of the following chapters:

I Unity or diversity of the legal regime of reservations to multilateral treaties (reservations to human rights treaties);

II Definition of reservations
(This chapter would also discuss the question of interpretative declarations and their legal regime);

III Formulation and withdrawal of reservations, acceptances and objections;

IV Effects of reservations, acceptances and objections;

V Fate of reservations, acceptances and objections in the case of succession of States; and

VI The settlement of disputes linked to the regime of reservations. 284/

115. The Special Rapporteur estimated, subject to unforeseen difficulties and in view of the purely provisional nature of the estimate, that the task could be concluded within four years, so that the first reading of the guide to practice in respect of reservations to treaties could be completed in 1999 with the consideration of chapters V and VI.

116. Chapter II of the report dealt, on the one hand, with the question of the unity or diversity of the legal regime of reservations to treaties and, on the other, with the specific question of reservations to human rights treaties. In this regard, the Special Rapporteur emphasized that this chapter, (item I of the general outline proposed in chapter I of his report) sought to determine whether the rules applicable in respect of reservations to treaties (whether codified by the 1969 or 1986 Conventions or customary in character) were applicable to all treaties, regardless of their object, and particularly to human rights treaties. He recalled that the question had been posed with some insistence both during the debate and during the discussion in the Sixth Committee of the General Assembly at its fiftieth session. The question corresponded to concerns raised by the practice and recent - and controversial - jurisprudence of human rights treaty monitoring bodies in

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284/ See document A/CN.4/477, para. 37.

regard to reservations. It therefore seemed necessary to him for the International Law Commission to state the view of general international law of which it was one of the organs. It was for that reason that the Special Rapporteur deemed it advisable to tackle the subject in his second report, for it seemed to him to be a matter of some urgency.

117. The first question concerned the unity or diversity of the legal regime(s) applicable to reservations and could be posed in these terms: do some treaties (for example, "normative" treaties) escape or should they escape the application of the Vienna regime because of their object? If so, to what particular regime(s) were those treaties subject or should they be subject in regard to reservations? This question of principle could be examined in three stages.

118. First, the Special Rapporteur discussed the diversity of treaties and the legal regime of reservations. He held the view that it was prudent to confine the study only to normative treaties, setting aside other categories of treaty (limited treaties, constituent instruments of international organizations, bilateral treaties, etc.) either because they have already been the subject of separate treatment (particularly in the 1969 and 1986 Vienna Conventions) or because he intended to deal with them at a later stage in the study. On the other hand, "normative" treaties ("codification" or human rights conventions or conventions establishing rules of conduct for all States in legal, technical, social, humanitarian and other fields) posed special problems for the topic under consideration because, in the view of some, the general legal regime of reservations would not apply to them or quite simply because those instruments by their very nature would not lend themselves to the formulation of reservations, especially human rights treaties. He pointed out that this term often encompassed several classes of treaties of a very differing nature and did not constitute a homogeneous category. Furthermore, while they did have certain essential features conferred on them by their "normative" character, designed above all to institute common international regulation on the basis of shared values, it was important not to take too simplistic a view: such treaties still contained typically contractual clauses.

119. In this context, the Special Rapporteur first considered the function of the legal regime of reservations. Two apparently contradictory interests were involved: on one side, the interest of broadening the convention, and on the other, the integral nature of the convention. The function of the rules applicable to reservations was to strike a balance between these conflicting

requirements: the aim to secure broader participation and, at the same time, to preserve the ratio contrahendi, of what constituted the treaty's raison d'être.

120. The problem could also arise in terms of consent in the light of the consensus basis of the law of treaties: from that standpoint, a balance should be found between the freedom of consent of the reserving State and that of the other States parties. It was from the standpoint of these requirements that the Special Rapporteur wondered whether the legal regime of reservations set out in the 1969 and 1986 Vienna Conventions was generally applicable and, in particular, whether it was suited to the particular character of "normative" treaties (or rather, the "normative clauses" in general multilateral treaties).

121. In doing so, the Special Rapporteur discussed the background of the "Vienna regime" and its sources (travaux préparatoires, previous work of the International Law Commission, and so on) to show that the authors of the regime had been aware of these requirements and, in response, had sought to adopt generally applicable rules. Both the International Law Commission and the conferences on the codification of the law of treaties had tried to establish a single regime applicable to reservations to treaties, regardless of their nature or object.

122. Second the Special Rapporteur considered the question of whether the "Vienna regime" was applicable more particularly to normative treaties and especially to human rights treaties. (This question was linked with the problem of the admissibility of reservations to such instruments, but it was a problem for which there was still no possible conclusion and one which depended on political or ideological considerations). There was no lack of arguments in favour of an affirmative answer (greater participation of States in such treaties, participation better than no participation) or a negative answer (contradiction between "reservation" and human rights, particular nature of such treaties by virtue of their quasi-legislative function and the uniformity of application).

123. The Special Rapporteur none the less noted that the real legal question lay in the question of whether or not, when the contracting parties remained silent on the legal regime of reservations, the rules contained in the 1969 and 1986 Conventions were suited to any kind of treaty, including "normative" treaties, including human rights treaties.

124. In order to answer this question affirmatively, the Special Rapporteur noted that the rules applicable to this type of treaty under the Vienna Conventions struck a good balance between the concerns expressed both by the advocates of reservations and those expressed by their opponents. He also noted that the basic characteristics of the "Vienna regime", i.e. its flexibility and adaptability, had enabled it to meet the particular needs and special features of all types of treaties or treaty provisions and had led the International Law Commission, in 1963 and 1966, to rule out any exception in favour of normative treaties.

125. In its Advisory Opinion on "Reservations to the Convention on Genocide", the International Court of Justice had already drawn attention to the advantages of greater flexibility in the international practice concerning multilateral conventions, which it had applied to a human rights treaty *par excellence*. The Special Rapporteur identified three elements that enabled the "Vienna regime" to apply satisfactorily to all treaties, regardless of their object, including human rights treaties:

(a) The permissibility of reservations had to be evaluated in the light of the object and purpose of the treaty;

(b) The freedom of the other contracting parties to agree was fully preserved through the mechanism of acceptances and objections; and

(c) The right to "formulate" reservations was only of a residual nature, since each treaty could restrict such freedom and even prohibit any or certain reservations.

126. Consequently, the "Vienna regime" was suited to the particular features of normative treaties. The Special Rapporteur noted that problems related to the "integrity" of normative treaties, problems with regard to the "non-reciprocity" of undertakings and problems of equality between the parties were not likely to prevent the "Vienna regime" from being applicable. It was clear that:

(a) The regime of reservations established by the 1969 and 1986 Conventions was conceived by its authors as being able to be, and being required to be, applied to all multilateral treaties, regardless of their object, with the exception of certain treaties concluded by a limited number of parties and the constituent instruments of international organizations, for which some limited exceptions were made;

(b) Because of its flexibility, the regime was suited to the particular characteristics of normative treaties, including human rights instruments;

(c) While not ensuring their absolute integrity, which was scarcely compatible with the actual definition of reservations, it preserved their essential content and would guarantee that it was not distorted;

(d) This conclusion was not contradicted by the arguments alleging the so-called violation of the principles of reciprocity and equality between the parties: if such a violation occurred it would be caused by the reservations themselves and not by the rules applicable to them; moreover, these objections were hardly compatible with the actual nature of normative treaties, which were not based on reciprocity of the undertakings given by the parties;

(e) There was no need to take a position on the advisability of authorizing reservations to normative provisions, including those relating to human rights: if it was considered that they must be prohibited, the parties were entirely free to exclude them or limit them as necessary by including an express clause to this effect in the treaty, a procedure which was perfectly compatible with the Vienna rules, which were only of a residual nature.

127. Third, the Special Rapporteur considered the implementation of the general reservations regime and, in particular, the application of the Vienna regime to human rights treaties. In practice, the basic criterion of the object and purpose of the treaty was applied to reservations to such treaties (including those cases where there were no reservations clauses). This basic principle was embodied in the texts of several human rights treaties and the practice of States: the particular nature of normative treaties therefore had no effect on the reservations regime.

128. Referring to machinery for monitoring the implementation of the reservations regime, the Special Rapporteur noted that additional forms of control carried out directly by human rights treaty monitoring bodies had developed since the Vienna Conventions. There were thus two parallel types of monitoring of the permissibility of reservations in this regard: traditional mechanisms (monitoring by the contracting States and, as appropriate, by the courts in the dispute settlement context) and the human rights treaty monitoring bodies. The role of the latter in respect of reservations had acquired genuine significance in the past 15 years both at the regional level (practice of the Commissions of the European and Inter-American Courts of Human Rights) and at the international level

(the Committee on the Elimination of Discrimination against Women and, in particular, the Human Rights Committee, 285/ etc.).

129. The basis for the control carried out by the monitoring bodies was linked to their mandate itself. Since these instruments established bodies to monitor their implementation, these bodies had the competence vested in them by their own powers, in accordance with a general principle of law that is well established and recognized in general international law. These bodies would be able to carry out their functions only if they could be sure of the exact extent of their competence *vis-à-vis* the States concerned and such competence depended on the scope and validity of the expression of consent to be bound. In practice, moreover, the monitoring bodies verified the permissibility of reservations on the basis of the criterion of the object and purpose of the treaty. The Special Rapporteur noted that, consequently and in view of this development, a combination of the various means of verifying the permissibility of reservations existed with regard to human rights treaties (traditional monitoring by the contracting States in parallel with the control exercised by a monitoring body, when that body had been established by the treaty, in addition to other bodies, such as international jurisdictional or arbitral bodies, in the dispute settlement context, and even national courts). This situation does not exclude - in fact, it implies - a degree of complementarity among the different control methods, as well as cooperation among the bodies responsible for control.

130. The Special Rapporteur looked into the consequences of the findings of monitoring bodies. According to some opinions based on the principle of the "severability" of the reservation (the possibility of severing it from the rest of the expression by a State of its consent to be bound), only an "impermissible" reservation should be regarded as null and void, whereas the State continued to be a party to the treaty. However, this approach was contrary to the consensual principle, the basis of any treaty undertaking.

131. The Special Rapporteur nevertheless considered that the legal force of the findings made by monitoring bodies in the exercise of their determination power could not exceed that resulting from the powers vested in them for the performance of their general monitoring role. Thus, even where a reservation was found to be impermissible, they could not take the place of the State in determining whether or not it had intended to be bound by the treaty despite

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285/ See General Comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994.

the impermissibility of the reservation. It was always the responsibility of States and States alone to rectify any impermissibility after having examined the findings in good faith.

132. In no case could any organ for determining the permissibility of reservations take the place of the reserving State in determining the latter's intentions regarding the scope of the treaty obligations it was prepared to assume; the State itself was thus responsible for deciding how to put an end to the defect in the expression of its consent arising from the impermissibility of the reservation. That "remedy" might take the form of the withdrawal of the impermissible reservation, its amendment along lines compatible with the object and purpose of the treaty or the termination of the State's participation in the treaty.

133. By way of conclusion, the Special Rapporteur summarized the main findings contained in his report. He noted that reservations to treaties did not require a normative diversification; the existing regime was characterized by its flexibility and its adaptability and it achieved satisfactorily the necessary balance between the conflicting requirements of the integrity and the universality of the treaty. That objective of equilibrium was universal. Whatever its object, a treaty remained a treaty and expressed the will of the States (or international organizations) that were parties to it. The purpose of the reservations regime was to enable those wishes to be expressed in a balanced manner and it succeeded in doing so in a generally satisfactory way. It would be unfortunate to call the regime into question by attaching undue importance to sectorial considerations that could perfectly well be accommodated within the existing regime.

134. According to the Special Rapporteur, this general conclusion must nevertheless be tempered by two considerations:

(a) First, it was undeniable, that the law had not been frozen in 1951 or 1969; issues which had not or had scarcely arisen at that time had since emerged and called for answers; the answers could be found in the spirit of the "Vienna rules", although they must be adapted and extended, as appropriate, whenever that was found to be necessary;

(b) Secondly, it should be borne in mind that the normal way of adapting the general rules of international law to particular needs and circumstances was to adopt appropriate rules by the conclusion of treaties - and that could be easily done in the area of reservations through the adoption of derogating reservations clauses, if the parties saw a need for them.

135. No determining factor seemed to require the adoption of a special reservations regime for normative treaties or even for human rights treaties. The special nature of these instruments had been fully taken into account by the Judges in 1951 and the "codifiers" of later years and had not seemed to them to justify an overall derogating regime.

136. There was reason to believe, however, that the drafters of the Vienna Conventions had never envisaged the role which the bodies for monitoring certain treaties might have to play in applying the reservations regime they had established, especially in the area of protection of human rights. But this role could easily be circumscribed by the application of general principles of international law and by taking account of both the functions of a reservations regime and the responsibilities assigned to those bodies.

137. The Special Rapporteur recalled that his report contained a draft resolution on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to clarifying the legal aspects of the matter. 286/

286/ The Special Rapporteur proposed that the following resolution be adopted by the Commission:

DRAFT RESOLUTION OF THE INTERNATIONAL LAW COMMISSION
ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES
INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission,

Having considered, at its forty-eighth session, the question of the unity or diversity of the juridical regime for reservations,

Aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights,

Desiring that the voice of international law be heard in this discussion,

1. Reaffirms its attachment to the effective application of the reservations regime established by articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986, and particularly to the fundamental criterion of the object and purpose of the treaty as the fundamental criterion for determining the permissibility of reservations;

2. Considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of

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preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. Considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions are fully applicable to reservations to such instruments;

4. Nevertheless considers that the establishment of monitoring machinery by many human rights treaties creates special problems that were not envisaged at the time of the drafting of those conventions, connected with determination of the permissibility of reservations formulated by States;

5. Also considers that, although these treaties are silent on the subject, the bodies which they establish necessarily have competence to carry out this determination function, which is essential for the performance of the functions vested in them, but that the control they can exercise over the permissibility of reservations does not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate, by the organs for settling any dispute that may arise concerning the implementation of the treaty;

6. Is also firmly of the view that it is only the reserving State that has the responsibility of taking appropriate action in the event of incompatibility of the reservation which it formulated with the object and purpose of the treaty. This action may consist in the State either forgoing becoming a party or withdrawing its reservation, or modifying the latter so as to rectify the impermissibility that has been observed;

7. Calls on States to cooperate fully and in good faith with the bodies responsible for determining the permissibility of reservations, where such bodies exist;

8. Suggests that it would be desirable if, in future, specific clauses were inserted in multilateral normative treaties, including human rights treaties, in order to eliminate any uncertainty regarding the applicable reservations regime, the power to determine the permissibility of reservations enjoyed by the monitoring bodies established by the treaties and the legal effects of such determination;

9. Expresses the hope that the principles enunciated above will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights; and

10. Suggests to the General Assembly that it bring the present resolution to the attention of States and bodies which might have to determine the permissibility of such reservations.

138. Owing to the lack of time, the Commission was unable to consider the report and the draft resolution. It decided to defer the debate on the topic until next year. However, several members congratulated the Special Rapporteur on his report which dealt with an extremely complex and sensitive issue. Accordingly, they recalled that it would be advisable for the Commission to give detailed consideration to some questions raised by the report, possibly taking account of other types of normative treaties. The fact that the Special Rapporteur had annexed a bibliography to his report was also praised. Some members expressed regret that the Commission had not found time to take action on the report at its forty-eighth session.

139. Some members also said that they agreed in principle with the idea of adopting a resolution along the lines proposed by the Special Rapporteur. Other members did not object to it, but expressed doubts about the advisability of such a resolution.

140. The question of the establishment of a working group on that question was also raised.

CHAPTER VII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

141. Having regard to paragraph 9 of General Assembly resolution 50/45 of 11 December 1995, 287/ the Commission considered the matter under item 7 of its agenda entitled "Programme, procedures and working methods of the Commission and its documentation" and referred it to the Planning Group of the Enlarged Bureau.

142. The Planning Group held six meetings: it had before it the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session, entitled "Other decisions and conclusions of the Commission". 288/ Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, addressed the Planning Group at its second meeting.

1. Procedures and working methods

143. The Planning Group established an informal working group 289/ which discussed all the issues involved. It prepared a draft on the subject which constituted the basis for the report of the Planning Group.

144. At its 2459th to 2461st meetings from 12 to 16 July 1996, the Commission considered and endorsed the Planning Group's report.

PART I

SUMMARY AND PRINCIPAL CONCLUSIONS

The General Assembly's request

145. In 1995, the General Assembly requested the Commission "to examine the procedure of its work for the purpose of further enhancing its contribution to the progressive development and codification of international law and to include its views in its report to the General Assembly at its fifty-first session". It also sought comments from Governments on "the present state of the codification process within the United Nations system".

146. In response to the Assembly's request, Part II of this Report reviews the Commission's procedures and seeks to identify changes which might enhance its

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287/ See para. 150 below.

288/ Document A/CN.4/472/Add.1, paras. 175-190.

289/ It consisted of Mr. J. Crawford (Convenor), Mr. D. Bowett, Mr. K. Idris, Mr. A. Pellet and Mr. S. Rao.

usefulness and efficiency. Some of these changes the Commission itself can make; others will require the cooperation of other bodies, especially the Sixth Committee.

147. This Summary sets out the main conclusions and recommendations of the Report.

General conclusions and recommendations

Conclusions

148. To decide what methods will enhance the progressive development and codification of international law requires one to take a view of the present scope for progressive development and codification, after nearly 50 years of work by the Commission. On this question, the Planning Group reaches the following general conclusions.

(a) The distinction between codification and progressive development is difficult if not impossible to draw in practice; the Commission has proceeded on the basis of a composite idea of codification and progressive development. Distinctions drawn in its Statute between the two processes have proved unworkable and could be eliminated in any review of the Statute (paras. 157-160).

(b) Despite the many changes in international law and organization since 1949, there is important continuing value in an orderly process of codification and progressive development (paras. 168-171).

(c) There are a number of ways in which the Commission's work methods may be made more responsive and efficient, and the relationship with the Sixth Committee structured and enhanced (paras. 172-177).

Recommendations

149. For the reasons given in Part II, the Commission makes the following specific recommendations.

(a) Work should continue, following the procedure established by the Commission in 1992, to identify possible topics of future work to be recommended to the General Assembly (paras. 165-166).

(b) In parallel, the General Assembly - and through it other bodies within the United Nations system - should be encouraged to submit to the Commission possible topics involving codification and progressive development of international law (paras. 166, 178-179).

(c) The Commission should extend its practice of identifying issues on which comment is specifically sought from the Sixth Committee, where possible in advance of the adoption of draft articles on the point (para. 182).

(d) Questionnaires sent to Governments should be "user-friendly"; in particular they should provide clear indications of what is requested and why (para. 182).

(e) The Commission's report should be shorter, more thematic, and should make every attempt to highlight and explain key issues in order to assist in structuring debate on the Report in the Sixth Committee (para. 182).

(f) Special rapporteurs should be asked to specify the nature and scope of work planned for the next session (para. 190). Their reports should be available sufficiently in advance of the session at which they are to be considered (para. 191).

(g) Special rapporteurs should be asked to work with a consultative group of members; this system should also be extended to the second reading of State responsibility (paras. 192-196);

(h) Special rapporteurs should as far as possible produce draft commentaries or notes to accompany their draft articles, and should revise them in the light of changes made by the Drafting Committee, so that the commentaries are available at the time of the plenary debate (paras. 197-201).

(i) The system of plenary debates in the Commission should be reformed, to provide more structure and to allow for an indicative summary of conclusions by the Chairman at the end of the debate, based if necessary on an indicative vote (paras. 202-211).

(j) The current system of different membership of the Drafting Committee for different topics should be maintained (para. 215).

(k) Working groups should be more extensively used, both in an effort to resolve particular disagreements and, in appropriate cases, as an expeditious way of dealing with whole topics; in the latter case the Working Group will normally act in place of the Drafting Committee (paras. 218-219).

(l) The Commission should set and report to the General Assembly on its targets at the beginning of, and should review its future work programme at the end of, each quinquennium (para. 222).

(m) The Commission should revert to the earlier practice of a session of 10 weeks, with the possibility of extension to 12 weeks as required, and especially during the last session of a quinquennium (para. 227).

(n) The experiment of a split session should be tried in 1998 (paras. 228-233).

(o) The contribution of the Secretariat to the Commission's work should be maintained and reinforced (paras. 234-235).

(p) The International Law Seminar should be retained (para. 236).

(q) Relations with other bodies such as the regional legal bodies should be more encouraged and developed (para. 240).

(r) The Commission should seek to develop links with other United Nations specialized bodies with law-making responsibilities in their field, and should in particular explore the possibility of exchange of information and even of joint work on selected topics (para. 241).

(s) Consideration should be given to the consolidation and updating of the Commission's Statute to coincide with the fiftieth anniversary of the Commission in 1999 (paras. 242-244).

PART II

DETAILED ANALYSIS

1. Introduction

150. By resolution 50/45 of 11 December 1995, the General Assembly, inter alia:

> "9. Request[ed] the International Law Commission:
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> (a) To examine the procedures of its work for the purpose of further enhancing its contribution to the progressive development and codification of international law and to include its views in its report to the General Assembly at its fifty-first session;
>
> (b) To continue to pay special attention to indicating in its annual report for each topic, those specific issues, if any, on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work;
>
> 10. Request[ed] the Secretary-General to invite Governments to comment on the present state of the codification process within the United Nations system and to report thereon to the General Assembly at its fifty-first session ...".

151. The Commission has kept its work methods under rather continuous review over the years, and has introduced a number of changes. 290/ But as the above paragraphs suggest, and as the debate on the Commission's report in the Sixth Committee in 1995 indicated, 291/ there is a perceived need for a more comprehensive review of "the present state of the codification process within the United Nations system", and of the future role of the Commission within that process. In accordance with paragraph 9 of General Assembly resolution 50/45, the Commission is asked to examine its own procedures in that regard.

152. This report has been produced by the Commission 292/ as part of the continuing consideration within the Commission of its work methods and procedures, and by way of response to the General Assembly's request in paragraph 9 of resolution 50/45. It seeks to identify any changes in the procedures of its work which might enhance the Commission's usefulness and efficiency. 293/ As will be seen, some of these changes are within the Commission's power to make; others will require the initiative or cooperation of other bodies, and especially the Sixth Committee itself.

153. Discussion of the Commission's procedures needs to take into account a number of reforms adopted by the Commission in recent years as well as limitations imposed on its work by external factors. Rather than give a

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290/ For earlier discussions of work methods, see e.g. the debate recorded in Yearbook ... 1958 vol. II at pp. 107-110, based on a report by Mr. Zourek (A/CN.4/108). During the current (1992-1996) quinquennium, the ILC has sought to streamline its annual report (Yearbook ... 1992 vol. II p. 136), has revised the arrangements for the work of the drafting committee (Yearbook ... 1992 vol. II pp. 135-136), has processed a major topic (the proposed international criminal court) within three sessions through the use of an ad hoc working group (for the final recommendation see A/48/10, pp. 42, 255-335), and has introduced a more orderly and comprehensive procedure for consideration of possible new topics.

291/ See Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session (A/CN.4/472/Add.1, 10 January 1996), pp. 45-49.

292/ An initial draft was produced by a small working group consisting of Mr. Crawford (Convenor), Mr. Bowett, Mr. Idris, Mr. Pellet and Mr. Rao, and was revised by that working group to reflect discussion in the Planning Group.

293/ A number of these changes have been introduced in practice in the current quinquennium (see supra, note 290).

general account here, aspects of the Commission's work methods will be referred to in this report when necessary under each heading.

2. The scope for continuing codification and progressive development

154. Underlying the Assembly's request in paragraph 9 of General Assembly resolution 50/45 is the aim of "enhancing [the Commission's] contribution to the progressive development and codification of international law". The question what procedures of work will best achieve that result requires one to take a view as to the present scope for progressive development and codification, after nearly 50 years of work by the Commission.

155. The Commission was established by General Assembly resolution 174 (II) of 21 November 1947, [294] and held its first session, lasting nearly nine weeks, in 1949. There was a substantial body of opinion at the time in favour of a full-time Commission.

156. The object of the Commission is stated to be "the promotion of the progressive development of international law and its codification" (Statute, article 1 (1)); its focus is to be "primarily" public international law, although it is not precluded from entering the field of private international law (Statute, article 1 (2)). In recent years the Commission has not so entered, except incidentally and in the course of work on subjects of public international law; moreover having regard to the work of bodies such as UNCITRAL and the Hague Conference on Private International Law, it may seem unlikely that it will be called on to do so.

(a) The "distinction" between codification and progressive development

157. Article 1 of the Statute draws a distinction between "progressive development of international law" and "its codification". That distinction is further developed in article 15, where the idea of progressive development is ("for convenience") associated with the preparation of draft conventions, while the idea of codification of international law is associated with "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". As is well known, however, the distinction between codification and progressive development is difficult if not impossible to draw in practice, especially when one descends to the detail which is necessary in

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[294] The Statute has been amended on six occasions, most recently by General Assembly resolution 36/39 of 18 November 1981, which enlarged the number of members from 18 to 34.

order to give more precise effect to a principle. 295/ Moreover it is too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions. Flexibility is necessary in the range of cases and for a range of reasons.

158. Thus the Commission has inevitably proceeded on the basis of a composite idea of "codification and progressive development". In other words, its work has involved the elaboration of multilateral texts on general subjects of concern to all or many States, sucn texts seeking both to reflect accepted principles of regulation, and to provide such detail, particularity and further development of the ideas as may be required.

(b) The selection of topics for the Commission's work

159. A further aspect of the distinction drawn in the Statute between codification and progressive development relates to the selection of topics for work by the Commission. The Statute implies that the initiative for considering proposals for progressive development will emanate from the General Assembly (article 16) or other bodies (article 17), whereas it is for the Commission itself to select topics for codification which it may recommend to the General Assembly (article 18 (1), (2)). 296/ Article 18 (1) provides that:

> "The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not."

160. In practice the procedure for considering most of the subjects which the Commission has taken up has been much the same, whether or not the aspect of progressive development or codification might have been thought to predominate. Since 1970, most of the suggestions for future work have emanated from the Commission, although it was the General Assembly which, for

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295/ See e.g. H.W. Briggs, The International Law Commission (Ithaca: Cornell University Press, 1965) pp. 129-141; S. Rosenne, Practice and Methods of the International Law Commission (New York: Oceana, 1984) pp. 73-74; I. Sinclair, The International Law Commission (Cambridge: Grotius, 1987) pp. 46-47, 120-126; R. Ago, "Nouvelles reflexions sur la codification du droit international" (1988) 92 RGDIP 539. See also Y. Daudet, Les conférences des Nations Unies pour la codification du droit international (L.G.D.J., Paris, 1968).

296/ On the other hand the General Assembly may request the Commission to work on any question of codification, and such requests are to have priority: article 18 (3).

example, reactivated the Code of Crimes against the Peace and Security of Mankind in 1981, 297/ and which requested the Commission to study the feasibility of an International Criminal Court. 298/ It should be stressed that the Commission has always sought the endorsement of the Assembly before engaging in detailed work on any project.

161. The survey of "the whole field of international law" for which article 18 (1) called was initially carried out on the basis of a Secretariat memorandum - in fact produced by Professor Hersch Lauterpacht, later a member of the Commission. 299/ That memorandum reviewed and the Commission considered 25 topics, of which the Commission drew up a "provisional list of 14 topics selected for codification". 300/ A number of these were chosen for initial work.

162. As at 1996, of the 14 topics which were initially and provisionally selected, 9 have been treated by the Commission, in whole or substantial part. 301/ Of the remaining five, one was taken up without success, was

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297/ General Assembly resolution 36/106, 10 December 1981.

298/ General Assembly resolution 45/41, 28 November 1990, para. 3; General Assembly resolution 46/54, 9 December 1991.

299/ A/CN.4/1/Rev.1; reprinted in E. Lauterpacht (ed.), The Collected Papers of Sir Hersch Lauterpacht (Cambridge: Cambridge University Press, 1970) vol. I, p. 445.

300/ Yearbook ... 1949, p. 281.

301/ These are as follows (with indications of the eventual outcome of the work):

(a) Succession of States and Governments (substantial areas of succession of States have been dealt with by the Commission, leading to the Vienna Conventions of 1978 and 1983; one area, succession with respect to nationality, is newly under consideration. It has never been actively proposed to study succession of Governments, no doubt because, in the light of the virtually uniform practice of continuity of State obligations despite changes of Government there is very little to say);

(b) Jurisdictional immunities of States and their property (Draft Articles produced in 1991 but consideration of them deferred by the General Assembly in 1994 for 3-4 years);

(c) Regime of the high seas (Geneva Convention on the High Seas, 1958) and Regime of territorial waters (Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958). In fact the Commission also developed draft then set aside, but has recently been proposed by the Commission for renewed partial treatment under the heading of Diplomatic protection; 302/ one (State responsibility) is still under consideration; 303/ and three have never been taken up. 304/

163. Additional topics were added to the work programme in a number of ways. Especially in the early years of the Commission, a number of matters were specially referred to it by the General Assembly. In total, 16 such requests or recommendations have been made by the General Assembly, but of these no fewer than 7 requests were made in the very early years of the Commission.

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articles on Fisheries and conservation of the living resources of the high seas and on the Continental Shelf (leading to the two further Geneva Conventions of 1958 on these subjects);

(d) Nationality, including statelessness (two draft conventions on the elimination/reduction of future Statelessness, leading to the adoption of the Convention on the Reduction of Statelessness, 1961);

(e) Law of treaties (Vienna Convention on the Law of Treaties, 1968; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986);

(f) Diplomatic intercourse and immunities (Vienna Convention on Diplomatic Relations, 1961);

(g) Consular intercourse and immunities (Vienna Convention on Consular Relations, 1963);

(h) Arbitral procedure (Model Rules on Arbitral Procedure, 1958).

302/ Viz., treatment of aliens. See the reports by H. Garcia Amador, Yearbook ... 1958 vol. II, pp. 47-73; Yearbook ... 1959 vol. II, pp. 1-37; Yearbook ... 1960 vol. II, pp. 41-67, and Yearbook ... 1961 vol. II, pp. 1-54.

303/ The Commission decided in 1963 to study the general or "secondary" rules of responsibility: Yearbook ... 1963 vol. II, p. 224. Detailed work did not begin until 1969, and has continued, under successive Special Rapporteurs (Ago, Riphagen, Arangio-Ruiz), until the present session, when it is expected that the first reading of the complete draft articles will be completed.

304/ Viz., Recognition of States and Governments; Jurisdiction with regard to crimes committed outside national territory; Right of Asylum. As to the second of these, the related topic of civil jurisdiction over matters occurring beyond the forum State was not included on the 1949 list - indeed it was hardly recognizable in the longer list from which that list was drawn: see Yearbook ... 1949 at p. 281.

164. In 1971/72 the Commission undertook a further and rather thorough review of its work, based on a series of Secretariat papers. 305/ The conclusions reached were modest: work would continue on the main topics then under consideration, and at the request of the General Assembly the topic of non-navigational uses of international watercourses was added. 306/

165. In 1992 the Commission embarked upon a more rigorous procedure for the selection of topics. 307/ A Working Group provisionally identified 12 topics as possible subjects of later work, and individual members were asked to write a short synopsis outlining the nature of the topic, the subject-matter to be covered, and the extent to which the topic was already dealt with in treaties or private codification projects by bodies such as the International Law Association or the Institut de Droit International. These synopses were published, 308/ and it was on the basis of the synopses that the Commission recommended in 1993 - and the General Assembly agreed - that work should begin on Reservations to treaties and on Succession of States as regards the nationality of natural and legal persons. 309/

166. The Commission believes this method of selection to be an improvement. Undertaking any new topic involves a measure of uncertainty, and requires a degree of judgement; the uncertainty is reduced, and judgement is assisted, if

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305/ See Yearbook ... 1969 vol. II, pp. 234-235; Yearbook ... 1970 vol. II, pp. 247-269; Yearbook ... 1971 vol. II (2), 1-99. For the Commission's discussion and conclusions see Yearbook ... 1971 vol. II (1), pp. 350-1; Yearbook ... 1972 vol. II, pp. 205-214; Yearbook ... 1973 vol. II, pp. 225-231. An earlier review had been carried out in 1962: Yearbook ... 1962 vol. II, pp. 84, 190, when the Commission had declined to add new topics to an already heavy load.

306/ See Yearbook ... 1973 vol. II, pp. 230-231; General Assembly resolution 2780 (XXVI), 3 December 1971. The second reading of the Draft articles on Non-navigational Uses of International Watercourses was completed in 1994: see A/49/10 pp. 196-326.

307/ Yearbook ... 1992 vol. II (2), p. 54.

308/ A/CN.4/454.

309/ Yearbook ... 1993 vol. II, pp. 243-248. In 1995, the topic of Diplomatic protection was selected for a feasibility study without prior elaboration through the preparation of a synopsis. General Assembly Official Records: Fiftieth Session, Supplement No. 10 (A/50/10), p. 264. General Assembly resolution A/50/45 of 11 December 1995, para. 8 noted this "suggestion" and invited Governments to submit comments on it.

the selection is made only after careful consideration on the basis of work which does not commit the Commission either to the topic, or to the selection of any particular manner of treatment of it. At the same time the General Assembly - and through it other bodies within the United Nations system - should be encouraged to submit to the Commission possible topics involving codification and progressive development of international law. The Commission's agenda should desirably include both topics referred to it and those generated by it, and approved by the General Assembly, through the procedure described above.

167. A Working Group on the long-term programme of work, set up by the Commission established a general scheme of topics of international law which included topics already taken up by the Commission, topics under consideration by the Commission and possible future topics. (See Annex II below)

(c) Codification and progressive development after 50 years

168. It was generally accepted after 1945 that international law was in many respects uncertain and undeveloped, and in need both of codification and progressive development. The simple idea that it would be possible, or even desirable, to express the whole of international law in a single "code" was soon dismissed. [310] Quite apart from other considerations, the drafting of such a code would have been a Napoleonic task. But the fruits of long-term codification and progressive development can be seen in such areas as, for example, the law of treaties, diplomatic and consular relations, and the law of the sea. [311] The applicable international rules in each of these fields are contained in texts which constitute the basic starting point for any legal consideration which may arise. This marks a clear advance in inter-State relations. It shows the continued value of an orderly process of "codification and progressive development".

169. On the other hand there have been many changes in inter-State relations and international institutions in the past 50 years, which potentially affect the work which it may be useful for the Commission to undertake. Relevant changes include:

310/ See Yearbook ... 1973 vol. II, pp. 227-228 (paras. 152-158).

311/ Although the governing instrument is now the United Nations Law of the Sea Convention of 1982, in key respects - especially concerning the territorial sea and the high seas - it incorporates the provisions of the 1958 Conventions.

(i) the technical and administrative character of many new legal issues;

(ii) a tendency to treat certain legal questions on a regional basis (e.g. some environmental issues) or even on a bilateral basis (e.g. investment protection);

(iii) the proliferation of bodies with special law-making mandates (whether permanent bodies such as UNCITRAL or the Legal Sub-Committee of the Committee on Peaceful Uses of Outer Space or ad hoc bodies such as the Third United Nations Conference on the Law of the Sea) or with primary institutional competence in a given field (the Human Rights Commission, the Human Rights Committee, United Nations Environmental Programme, World Trade Organization, etc.);

(iv) the work of United Nations specialized agencies in general (International Maritime Organization, International Civil Aviation Organization, etc.).

170. These factors do not all work in the same direction. The scope for the Commission to work without duplicating the work of other bodies is reduced with the proliferation of agencies with specific responsibility for particular fields of law or practice. On the other hand there is scope for collaboration with such agencies in developing areas of international law which are of general as well as specialized interest. The tendency to treat particular problems bilaterally may be a response to perceived deficiencies in the general law, deficiencies which ought none the less to be addressed. There is, overall, a risk of fragmentation in international law and practice, which the Commission, with its general mandate and vocation, can help to counteract.

171. Thus while it is true that many of the major topics traditionally identified as ripe for codification - e.g. the law of the sea, treaties, diplomatic and consular relations - have been completed, the idea that codification is no longer necessary is misplaced. Even in relation to areas now covered by treaty, practice may develop and raise new difficulties requiring further consideration - as for example with reservations to treaties. At the international level, "codification and progressive development" is a continuing process. Moreover the pace of development of international law is now rapid, and the fact is that private bodies which study current problems - such as the International Law Association and the Institut de Droit International - seem to have no difficulty in identifying

areas of law requiring, if not codification, then clarification, development and articulation. What the private bodies lack is the ability which the Commission as a body within the United Nations system has to obtain information from and engage in dialogue with Governments. This it can do through the Sixth Committee, through requests to Governments for information and comment, and through the Commission's direct links with regional consultative committees. So long as the process of liaison and dialogue is effective, the need for a body like the Commission is likely to continue.

172. On the other hand difficulties have emerged with the Commission's work, even in relation to the *first* generation of projects. For various reasons, some major topics on the Commission's agenda have taken a very long time to complete. These reasons include the importance, size and difficulty of the subjects in question. But none the less this has had the effect of slowing the Commission's progress on other topics on its agenda, and of creating doubts as to the desirability of the Commission taking on new work while old work remained incomplete.

173. In the view of the Commission, a number of changes to its work methods are desirable to cope with the present situation. The remaining sections of this report are devoted to the question what changes should be made, under the following headings:

(i) the relations between the Commission and the General Assembly (Sixth Committee) (sect. 3);
(ii) the role of the Special Rapporteur (sect. 4);
(iii) the relations between the Commission, its Drafting Committee and working groups (sect. 5);
(iv) the length and structure of sessions (sect. 6);
(v) the Commission's relations with other bodies (sect. 7);
(vi) possible revision of the Statute (sect. 8).

3. The relations between the Commission and the General Assembly (Sixth Committee)

174. This matter was specifically referred to by the Assembly in preambular paragraph 7 of General Assembly resolution 50/45, which referred to the need ...

> "to enhance further the interaction between the Sixth Committee as a body of government representatives and the International Law Commission as a body of independent legal experts, with a view to improving the dialogue between the two organs".

While succinctly restating the character of the two bodies, this paragraph clearly implies that the dialogue between them could be improved.

175. Under article 3 of its Statute, members of the Commission are elected by the General Assembly, from candidates nominated by Governments of United Nations Member States. The electors are enjoined to "bear in mind that the persons to be elected to the Commission should individually possess the qualifications required, and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured" (Statute, article 8). The existence of regional groups for the purposes of election is expressly recognized in the Statute as a result of the 1981 amendment (article 9), and this assists in assuring the representativeness of the Commission as a whole. On the other hand there is a healthy tradition within the Commission, which fully complies with members' independent status, that all members participate as individuals and that they are in no sense "representatives". 312/

176. As to individual qualifications, article 2 (1) requires that members "shall be persons of recognized competence in international law". Members are eligible for re-election without restriction (Statute, article 10); there is no age limit. It may be noted that there has never been a woman member of the Commission.

177. Against this background, the Commission turns to the substantive issues involved in the "interaction between the Sixth Committee as a body of government representatives and the International Law Commission as a body of independent legal experts".

(a) Initiation of work on specified topics

178. One important way in which new tasks can be generated for the Commission is in response to requests from the General Assembly or other United Nations organs. This is expressly envisaged in articles 16 and 18 (3) of the Statute, but in recent years these provisions have been little used; nor has the debate associated with the "Decade of International Law" seen the development of new ideas for inclusion in the Commission's agenda by the Sixth Committee. As the Commission demonstrated in its work on the subject of protection and inviolability of diplomatic agents and other persons entitled to special

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312/ The Statute itself is silent on the subject.

protection under international law, 313/ and more recently on the Draft Statute for an International Criminal Court, 314/ it is capable of responding promptly to such requests. Its response may involve the provision of commentary or advice, or (as in the two cases mentioned) the preparation of draft articles in a form appropriate for adoption at a diplomatic conference.

179. In the view of the Commission, the Commission's workload should desirably include both topics generated within the Commission and approved by the General Assembly, and topics generated elsewhere within the United Nations system and specifically referred to the Commission by the General Assembly under the Statute. Such requests may avoid duplication and encourage coordination in the international law-making effort. Of course topics referred should be appropriate to the Commission as "a body of independent legal experts" in the field of general international law.

(b) Review and commentary on work in progress

180. Discussion and feedback on the Commission's work by States takes a variety of forms. Especially in the early stages of work on a topic, States are asked to provide information about their practice and legislation, and to respond to a questionnaire. Representatives of Member States within the Sixth Committee provide oral comments on the Commission's annual report, and the discussion of the report in the Sixth Committee is now helpfully subdivided so as to focus on the various components of the report. In addition States are asked to provide formal written comments in response to particular requests made by the Commission in its report, and on the draft articles as adopted on first reading on any topic.

181. There is, however, considerable variation in the extent to which Governments provide information and comment on the Commission's reports and drafts. Governments may be content to allow work on a topic to develop, or being generally able to accept the lines of work may feel no need to comment. Others may wish to change the direction of particular work and may therefore be more vocal. Many Governments, especially those of developing countries, have very limited resources to devote to the task. None the less the fact

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313/ This request came from the Security Council via the General Assembly: see A/9407; General Assembly resolution 3166 (XXVIII), 14 December 1973; see also Yearbook ... 1972, vol. II, p. 312.

314/ See General Assembly resolution 45/41, 28 November 1990, para. 3, and for the Draft Statute see Report ... 1994 (A/49/10), p. 43.

remains that in many cases requests by the Commission for comments, or even for information, go unanswered. 315/ Interaction between the Commission and Governments is vital to the Commission's role, and there is scope for improvement on both sides.

182. For its part the Commission believes that it should strive to extend its practice of identifying issues on which comment is specifically sought, if possible in advance of the adoption of draft articles on the point. These issues should be of a more general, "strategic" character rather than relating to issues of drafting technique. The Commission should strive to ensure that the report and any questionnaires sent to Governments are more "user-friendly" and that they provide clear indications of what is requested and why. In particular the Commission's report should be shorter, more thematic, and should make every attempt to highlight and explain key issues. The role of the General Rapporteur in the preparation of the report should be enhanced. 316/ The Commission should return to those issues in the new quinquennium.

(c) The Sixth Committee's role in dealing with final drafts of the Commission

183. The task of the Commission in relation to a given topic is completed when it presents a completed set of draft articles on that topic to the Sixth Committee. The purpose of the Commission is - it is believed - fully performed if the draft articles and accompanying commentary articulate the relevant principles in a manner generally suitable for adoption by States. On the other hand, whether a particular set of draft articles is acceptable or appropriate for adoption at a given time is essentially a matter of policy for the Sixth Committee and for member States.

315/ The numbers of written responses by Government to Commission's questionnaires on some recent topics have been as follows:

State responsibility:	15	(Yearbook ... 1980, vol. II (1), p. 153;
		(Yearbook ... 1981, vol. II (1), p. 71)
Watercourses:	21	(A/CN.4/447 and Add 1-3)
Draft Code of Crimes:	13	(Yearbook ... 1985, vol. II (1), p. 84;
		(Yearbook ... 1987, vol. II (1), p. 11;
		(Yearbook ... 1990, vol. II (1), p. 23)
Immunity of States:	28	(Yearbook ... 1988, vol. II (1), p. 45)
Diplomatic Bag:	30	(Yearbook ... 1988, vol. II (1), p. 121;
		(Yearbook ... 1989, vol. II (1), p. 75)
Treaty reservations:	13	(as at 5 June 1996).

316/ See A/CN.4/L.473, p. 7.

184. The response to a set of draft articles or other work of the Commission can take a variety of forms. In transmitting its work the Commission will itself make an initial recommendation on the point, 317/ but the choice of means is a matter for the Sixth Committee. In the case of a text which is not recommended for adoption as a convention, a less extended procedure of noting or incorporation in a General Assembly resolution may be all that is required. In the case of draft articles which could form the basis for a convention, the Sixth Committee can merely note the outcome, can deal with it in a preliminary way through a working group or convene a preparatory conference for a similar purpose, can convene a diplomatic conference forthwith, or (as with the draft articles on the Law of Non-navigational Uses of International Watercourses, currently under consideration) can elect to deal with the draft articles itself. Article 23 (2) of the Statute also contemplates that the Assembly "may refer drafts back to the Commission for reconsideration or redrafting". This possibility might be more effectively used.

185. The Commission would simply note that if there are serious doubts about the acceptability of *any* text on a given subject, it would be helpful if these were made known authoritatively by the General Assembly and Governments at an earlier stage, rather than being postponed or the difficulties shelved until after the Commission has completed its work and presented it to the Sixth Committee.

4. The role of the Special Rapporteur

(a) Appointment

186. Central to the working of the Commission has been the role of the special rapporteur. In fact the Statute only expressly envisages such an appointment in the case of projects for progressive development (article 16 (a)). 318/ But from the very first, the practice of the Commission has been to appoint a

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317/ Statute, article 23.

318/ Article 16 of the Statute qualifies this requirement with the words "in general", but the Rapporteur is clearly considered as central to the process laid down (e.g. in subparas. (d), (f) and (i)).

special rapporteur very early in the consideration of a project, and to do so without regard to whether the project might be classified as one of codification or progressive development. 319/

187. In practice rapporteurships tend to be distributed among members from different regions. This system, provided that it is applied with some flexibility, has many advantages, in particular in that it helps to ensure that different approaches and different legal cultures are brought to bear in the formulation of reports and proposals.

188. It should be stressed that difficulties which have been experienced in the Commission's work have largely been due not to the appointment of a special rapporteur for a topic but to the fact that special rapporteurs have tended, or even been expected, to operate in isolation from the Commission, with little guidance during the preparation of reports on the direction of future work. It is to this essential point, as the Commission identifies it, that the following paragraphs are largely directed.

(b) Elaboration of reports

189. It is through the preparation of (usually annual) reports that special rapporteurs mark out and develop their topic, explain the state of the law and make proposals for draft articles. A number of issues arise with respect to the preparation of reports.

(i) Need for prior approval by the Commission of the nature and scope of work planned for the next session

190. Present practice in the Commission is not uniform. Some rapporteurs disclose in fair detail the kind of report they have in mind to present to the next session; others do not. On balance, and whilst conceding the need for rapporteurs to enjoy a certain independence, disclosure ought to be the rule. It is essential that future reports should meet the needs of the Commission as a whole. Disclosure gives the possibility of feedback, both on matters of general direction and on particular points of substance. By contrast a report which treats an issue which the Commission regards as peripheral, or which fails to treat an issue which the Commission regards as central, will mean in effect that a session has been wasted.

319/ See e.g. Yearbook ... 1949 at p. 281 (initial appointment of rapporteurs for the topics law of treaties, arbitral procedure and regime of the high seas): the Commission at the same time sought data from Governments under article 19 (2) of the Statute, which is formally applicable only to codification projects: ibid.

(ii) Availability of reports before the beginning of the session

191. Here again present practice is not uniform. Some reports are circulated in advance of the session, some are not. Delays in translation and circulation due to financial constraints on the United Nations or to its rules for documentation are, of course, beyond the control of a special rapporteur. 320/ But it is highly desirable that all reports should be available to Commission members some weeks before the commencement of the session, to enable study and reflection. This would be even more the case with a shorter session.

(c) Need for a standing consultative group

192. Article 16 (d) of the Statute envisages that "where the General Assembly refers to the Commission a proposal for the progressive development of international law", the Commission may "appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies" to the questionnaire circulated to Governments. This may imply that, furnished with replies, the special rapporteur is thereafter to work independently. But in most cases the practice has been for the special rapporteur to work largely in isolation in preparing reports. In other words, in the period between sessions a special rapporteur has no formal contact with other members of the Commission.

193. Other bodies, such as the International Law Association and the Institut de Droit International, work differently. Various members are chosen to act as a consultative group so that, between sessions, the rapporteur may consult over the best and most acceptable approach to be taken, and over the essential elements to the next report. Through questionnaires, the circulation of reports or exceptionally the holding of interim meetings, the group's advice is available. Although the report remains that of the rapporteur, it is likely that the input obtained will ensure that it is acceptable to the membership of the committee and by extension to the membership of the body as a whole.

194. The Commission notes that this method has been fruitfully employed in relation to the recent topic of State succession with respect to nationality. It believes that the method should be generally adopted, especially so far as

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320/ It may be noted that the deadline for responses to questionnaires, available the previous September, is often set very late - e.g. in March or April of the following year, making it difficult for special rapporteurs to take the responses fully into account in their reports of that year.

new projects are concerned, and especially in relation to the early work, including the strategic planning, on a subject. The consultative group should be appointed by the Commission itself, and should be broadly representative. 321/

195. No doubt care should be taken not to over-formalize matters, and it should be stressed that the report will remain the responsibility of the special rapporteur, rather than of the group as a whole. It is not the function of the group to approve the special rapporteur's report, but to provide input on its general direction and on any particular issues the special rapporteur wishes to raise. Whether the group is appointed for the duration of the quinquennium, or for some shorter period, can be determined on a case-by-case basis, in consultation with the Special Rapporteur.

196. Although these changes can be implemented without any amendment to the Statute, the Commission also recommends that in any revision of the Statute the principle of such a group should be recognized. Unlike the present Statute (see para. 186 above), this should be done without any distinction being drawn between codification and progressive development.

(d) Preparation of commentaries to draft articles

197. There is a distinction between a report which analyses the area of law and practice under study, and a focused commentary to draft articles. The preparation of the former is, of course, a key task of a Special Rapporteur, but so too is the latter. At present, it is not unusual for draft articles to be referred to the Drafting Committee without commentaries having been prepared contrary to the earlier practice of the Commission. Indeed, draft articles are sometimes presented for final consideration by the Commission without commentaries, and the commentaries are only adopted, with little time for consideration, in the last stages of a session.

198. It can be argued that, since the draft articles are likely to be changed substantially in the Drafting Committee, the provision of commentaries by a Special Rapporteur in advance is premature. On the other hand, the Drafting Committee is in a much better position if it has available to it at the same time both draft articles and commentaries (or at least an outline of what the commentaries will contain). The commentaries help to explain the purpose of the draft articles and to clarify their scope and effect. It often happens

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321/ It could also be adopted in the second reading of State responsibility, which it is very desirable should be completed within the forthcoming quinquennium.

that disagreement over some aspect of a draft can be resolved by the provision of additional commentary, or by the transfer of some provision from text to commentary or vice versa. The provision of articles alone precludes such flexibility, and may give the inclusion of some element in the text more importance than it deserves. Simultaneous work on text and commentary can enhance the acceptability of both. It may help avoid the undesirable practice of inserting examples in the text of an article - as is presently the case with draft article 19 (3) of Part One of State Responsibility. It will also form a valuable part of the *travaux préparatoires* of any treaty provision which may be adopted on the basis of the proposed text.

199. It should be stressed that commentaries in their final form are intended primarily as explanations of the text as finally adopted. Although an account of the evolution of that text is appropriate, the main function of a commentary is to explain the text itself, with appropriate references to key decisions, doctrine and State practice, so that the reader can see the extent to which the Commission's text reflects, or as the case may be develops or extends the law. Generally speaking it is not the function of such commentaries to reflect disagreements on the text as adopted on second reading; this can be done in plenary at the time of final adoption of the text and appropriately reflected in the report. 322/

200. Given the pressure of work on it, the Drafting Committee cannot be expected itself to produce revised commentaries. But, as soon as the Drafting Committee has approved a particular article, the commentary to that article should be prepared, or as the case may be revised, by the Special Rapporteur, with the assistance of the Secretariat. It should then be circulated either to members of the Drafting Committee or (as appropriate) to the members of the consultative group for the topic, to enable them to comment individually on

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322/ The position is rather different at first reading. Article 20 (c) (ii) of the Statute (which, however, deals with codification as distinct from progressive development) provides that the commentaries on texts adopted at first reading should indicate "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution". But the Statute contains no such indication with respect to final draft articles: see article 22.

it. As the Statute makes clear, 323/ draft articles should not be considered finally adopted without the Commission having approved the commentaries before it.

(e) The Special Rapporteur's role within the Drafting Committee

201. In practice it is in the Drafting Committee that divergent views on a topic are most clearly expressed and have to be reconciled; it is, equally, here that the independent role of the Special Rapporteur has to be accommodated with the range of views within the Commission. The demands of particular topics, and the approach of particular Special Rapporteurs, will always produce some diversity of practice. But as a general rule the Planning Group suggests that the role of the Special Rapporteur should comprise the following elements:

(i) to produce clear and complete articles, as far as possible accompanied either by commentaries or by notes which could form the basis for commentaries;

(ii) to explain, succinctly, the rationale behind the draft articles currently before the Drafting Committee, including any changes that may be indicated;

(iii) in the final analysis, to accept the view of the Drafting Committee as a whole, even if it is contrary to the views advanced by the Special Rapporteur, and as necessary to reflect the view of the Drafting Committee in revised articles and/or commentary. In performing this function, the Special Rapporteur should act as servant of the Commission rather than defender of any personal views *avant la lettre*.

202. Of course a Special Rapporteur who disagrees with the eventual views of the Drafting Committee has every right to explain the disagreement in plenary when the report of the Drafting Committee is presented. It is open to the plenary to prefer the views of the Special Rapporteur to those of the Drafting Committee in such a case. Having regard to the size of the Drafting Committee and to its role vis-à-vis the plenary, however, there are likely to be few such cases. Moreover it is better for major disagreements which cannot be

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323/ Article 16 (i) of the Statute provides that "The Rapporteur and the members appointed for that purpose ... shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission". To similar effect, see article 22.

resolved in the Drafting Committee to be reported at an earlier stage to the plenary, with the possibility of an indicative vote to settle the matter (see below, paras. 203-205).

5. The role and relationships of the plenary to the Drafting Committee and Working Groups

(a) General debates in plenary

203. The primary role of the general debate in plenary is to establish the broad approach of the Commission to a topic. This is essential if the Drafting Committee, or a working group, is to undertake its task with confidence. Such subsidiary organs need to be sure that they are working along lines broadly acceptable to the Commission as a whole.

204. Plenary debates at present do not serve this purpose very well, and there are two main reasons for this. The first is that the plenary debate tends to be too general, covering the whole of a perhaps lengthy report without distinction between various issues, and sometimes descending to particular textual points which would be better dealt with in the Drafting Committee.

205. A second factor is a tendency to make lengthy speeches, as if the Commission were a lecture audience, to be instructed rather than persuaded. Long speeches are not the ideal form of debate, which becomes diffuse and ceases to serve its primary purpose of giving guidance to the Commission, its committees and Special Rapporteurs on directions to be taken.

206. In the early days of the Commission speeches were almost invariably short, and focused on particular issues which may have given rise to difficulty or disagreement. In the Commission's view this is much the better practice, and the Commission should take steps to reinstate it as the norm.

207. Possible remedies include the following:

(i) First, an attempt should be made to provide a structure for the debate so that the Commission moves from point to point, with observations being restricted to the point under discussion. [324]

(ii) Second, members should exercise restraint. The best way to achieve this, in the view of the Planning Group is by the proper structuring of debate. In addition an informal "code of conduct" might be adopted favouring shorter interventions: the Chairman could call attention to this from time to time, if required.

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[324] This technique was usefully adopted in discussion of Mr. Thiam's Ninth Report on the Code of Crimes: Yearbook ... 1991, vol. I, 2205th-2214th meetings.

(iii) Third, at the conclusion of the debate the Chairman should attempt a summary of the Commission's broad conclusions on the point, at the same time noting any disagreement that may have been expressed. 325/ No doubt this may sometimes be a difficult task, but if carefully performed, and if generally accepted as accurate by members, it will substantially assist the Drafting Committee or working group in their subsequent consideration of the issues. In the consideration of final drafts of articles, the function should be performed by the Chairman of the Drafting Committee, in conjunction with the Special Rapporteur.

208. This leads to consideration of the method of voting. At present the Commission and its subsidiary bodies attempt to reach consensus, and there is no doubt that as a general rule this is right.

209. But there is a difference between the adoption of decisions which are effectively final and the type of conclusions we suggest the Chairman should express in concluding a plenary debate. These would be provisional and tentative; they would be for guidance only, as much would remain to be done before final decisions could be taken. On particular points which may be controversial, there is much to be said for the Chairman testing the acceptability of his conclusions by calling for an indicative vote. Even more so on points of detail, where it is better to resolve the issue, one way or another, and move on. Minority views can of course be reflected in the summary records and in the Commission's report.

210. Analogous situations will arise in subsidiary bodies such as the Drafting Committee. As work progresses, "decisions" need to be taken which are far from final, and it is burdensome and time-consuming to demand a consensus on all such matters. Members not in a majority in relation to an indicative vote would remain free to maintain their views at a later stage. However if there

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325/ At present this task, if performed at all, is performed by the Special Rapporteur. It might be better performed by the Chairman, leaving the Special Rapporteur as the author of the report under discussion to provide clarifications, and counter-arguments in response to comments.

is a major disagreement on a point of principle, it may be appropriate that this be referred to the plenary for decision by an indicative vote or other means.

211. When decisions ultimately come to be taken, again every effort should be made to reach a consensus, but if this is not possible in the time available, a vote may have to be taken, perhaps after a "cooling off period" to allow time for discussion and reflection. Such a vote may be a better indication of the opinion of the Commission than a "false consensus" adopted simply in order to save time.

212. One minor change which could usefully be introduced is to establish a convention that any congratulatory or honorific statements that may be called for should come from the Chairman alone, speaking on behalf of the whole Commission. The time of the Commission should be spent on the substance of its work.

(b) The Drafting Committee

213. In 1958, the Commission formally recognized that the Drafting Committee was "a committee to which could be referred not merely pure drafting points, but also points of substance which the full Commission had been unable to resolve, or which seemed likely to give rise to unduly protracted discussion". 326/ The need for the Drafting Committee to fulfil that role was accentuated with the further increase in the Commission's membership in 1981, and there can be no doubt that such a role continues to be vital.

214. This is not to say that the Drafting Committee should be the *only* body to perform that role. It will often be appropriate for issues on which there is an identified disagreement of principle to be referred to a smaller working group for discussion. Even if the point cannot be resolved by that group, the main lines of disagreement can usually be articulated and presented to the plenary in a form which allows a decision to be made, or an indicative vote taken. But in many other cases, issues of a lesser character will arise, or unforeseen points of principle emerge in the course of drafting, and inevitably the Drafting Committee will have the task of seeking to resolve these.

215. Membership of the Drafting Committee is burdensome: it meets on most days, and sometimes both mornings and afternoons. For this reason the recent

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326/ See Yearbook ... 1958, vol. II, p. 108.

practice of having Drafting Committees of largely different composition for different topics is to be welcomed, since it shares the burden between more members. 327/

216. On any given topic the Drafting Committee will usually consist of 12-14 members (with other members sitting as observers, and only occasionally speaking). This has the advantage that a consensus in the Drafting Committee is likely to attract substantial support in plenary.

217. Long statements are rare (and are to be discouraged). There is often a genuine debate. Discussion is predominantly in English and French, coinciding with the working language of the text under discussion, but members are free to use other official languages. In general the Drafting Committee works well.

(c) Working Groups

218. Working groups have been established by the Commission or by the Planning Group for different purposes and with different mandates. For example, it is usual to establish a working group on a new topic prior to the appointment of a Special Rapporteur, to help define the scope and direction of work. Another kind of group has the function of addressing and if possible resolving particular deadlocks. 328/ In addition working groups have sometimes been formed to handle a topic as a whole, e.g. in case of urgency, and will usually be of substantial size. The difference between this kind of working group and the Drafting Committee lies in the fact that, whereas the Drafting Committee works on texts of articles (and ideally on commentaries) prepared by a Special Rapporteur, a working group will begin work at an earlier stage in the process, when ideas are still developing. 329/ It may well continue its work over several sessions, with substantial continuity of membership, whereas the composition of the Drafting Committee changes from year to year. Such a working group is thus more closely involved in the formulation of an approach, and in the formulation of drafts. A good example is the Working Group which

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327/ The practice was introduced in 1992: see Yearbook ... 1992 vol. II (Part Two), p. 54.

328/ See e.g. the working group established in 1995 on "Rights and Duties of States for the Protection of the Environment", supra note 309, A/50/10, pp. 264-265.2

329/ In the case of the Working Group on the International Criminal Court, it divided itself into subgroups at one stage for the purpose of drafting.

elaborated the Statute for a Permanent International Criminal Court, which began by focusing on some basic propositions on which agreement could be reached, before even attempting to draft any articles. 330/ Its role could certainly not have been performed by the Drafting Committee.

219. In such a Working Group there may be no Special Rapporteur, or the Special Rapporteur may have a limited role. In most cases, if the working group has undertaken careful drafting, we see no advantage in having its work redone by the Drafting Committee before submission to plenary. This may duplicate work or even lead to mistakes if the members of the Drafting Committee have not been party to the detailed discussion which underlies a particular text. On occasions the Drafting Committee may have a role in engaging in a final review ("toilette") of a text - from the perspective of adequacy and consistency of language. But in such cases the procedure by way of a working group is an alternative, not a mere preliminary, to discussion in the Drafting Committee.

220. Whatever its mandate, a working group is always subordinate to the Plenary, the Planning Group or the other organ which establishes it. It is for the relevant organ to issue the necessary mandate, to lay down the parameters of any study, to review and if necessary modify proposals, and to make a decision on the product of the work.

6. Structure of Commission meetings

221. In the light of this discussion, we turn to issues of the structure of Commission meetings, including the planning of work over a quinquennium, and the length and arrangement of sessions.

(a) Planning of work over a quinquennium

222. At the first session of the current quinquennium in 1992, the Commission set targets for the quinquennium, targets which it has met and in one respect

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330/ General Assembly Official Records: Forty-seventh Session, Supp. No. 10 (A/47/10), p. 137.

exceeded. 331/ The Commission expects that a similar exercise will be carried out in 1997, the first year of the next quinquennium. It is also desirable that a review be carried out at the end of the quinquennium of the goals set, and of any preparations which should be made to enable the planning of the following quinquennium to be decided on expeditiously at the beginning of its first year.

(b) Length of sessions

223. The Statute does not specify the length of sessions, although it does say that they will normally be held in Geneva (article 12, as amended in 1955). In fact all sessions have been held in Geneva except the 1954 session which was held in Paris, and the 1965 session which was split between Geneva and Monaco. It was no doubt assumed that sessions would be held annually, and this has in fact been the case since 1949. The length of sessions was normally 10 weeks: 12 weeks became the norm following General Assembly resolution 3315 (XXIX) of 14 December 1974. Except for the 1965 session, sessions have always been held in a single continuous period.

224. In 1986 the normal 12 week session was reduced to 10 weeks for budgetary reasons, but in response to a strongly expressed view of the Commission, the 12 week session was restored in the following year and has been maintained since. The General Assembly has reaffirmed the need for the Commission to sit for the usual period of 12 weeks. 332/ The Commission now has almost twice as many members as it did originally. Its proceedings are inevitably lengthier, and this factor must be borne in mind when comparisons are made.

225. In principle, the Commission should be able to make a judgement on a year-to-year basis as to the likely required length of the following session

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331/ For the goals set in 1992 see A/CN.4/L.473, para. 15. Consistently with those goals the Commission finished the second reading of the watercourses topic in 1994, and of the Draft Code of Crimes in 1996. It completed the first reading of State responsibility in 1996. Through a working group it made progress on the topic of international liability for injurious consequences of acts not prohibited by international law (specifically in relation to prevention), and began work on two new topics. An additional achievement was the commencement and completion of the Draft Statute for an International Criminal Court, which was not envisaged in the 1992 report.

332/ See e.g. General Assembly resolutions 41/81, 3 December 1986; 42/156, 7 December 1987, and most recently General Assembly resolution 50/45 of 11 December 1995, para. 11.

(i.e. 12 weeks or less), having regard to the state of work and to any priorities laid down by the Assembly for the completion of particular topics.

226. In some years, a session of less than 12 weeks will be sufficient. In others, especially the last year in a quinquennium, nothing less that 12 weeks will suffice to enable complete texts to be finished on first or second reading with the same membership. For various reasons the Planning Group believes that in 1997 a 10 week session will be sufficient to cope with work in hand.

227. In the longer term, the length of sessions is related to the question of their organization, and in particular to the possibility of split sessions, to be discussed in the following section. Especially if a split session is adopted, the Commission believes that its work can usually be effectively done in a period of less than 12 weeks a year. It sees good reason for reverting to the older practice of a total annual provision of 10 weeks, with the possibility of extension to 12 weeks in particular years as required - and especially in the last year in a quinquennium.

(c) Possibility of a split session

228. Article 12 of the Statute (as amended in 1955) provides that the Commission is to sit at the United Nations Office in Geneva, although "after consultation with the Secretary-General" the Commission has "the right to hold meetings at other places". There is thus no statutory restriction on the Commission splitting its annual session into two parts, and for that matter sitting for one part of the session at United Nations Headquarters in New York. In 1991/92 a procedure of split sessions was suggested but set aside for the time being. 333/

229. Those in favour of a single session argue that it is only through a continuous process of work that the necessary careful consideration can be given to proposed draft articles, both in plenary and in the Drafting Committee. At any one session the Commission is usually working actively on four or five topics, of which two may have priority. In the context of a split shorter session, consideration of topics not given priority at that session may well be perfunctory, leading to episodic progress on those topics and a lack of guidance to the Special Rapporteur. It should be stressed that the task of reaching a genuine consensus on draft articles may be difficult and inevitably takes time. The Commission does not merely endorse proposals

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333/ *Yearbook ... 1992*, vol. II (Part Two), p. 55.

of Special Rapporteurs but has to give them careful and critical consideration. With 34 members, coming from different legal, cultural and linguistic backgrounds this process cannot be rushed. Moreover there is a problem of "critical mass": it is only by careful collective consideration in plenary, in the Drafting Committee and in working groups that really satisfactory conclusions can be worked out, and the splitting of the session would tend to interrupt and fragment this process. In the view of these members a continuous session is necessary to assure the best results on priority topics while maintaining progress and direction on other topics.

230. On the other hand, those in favour of a split session argue that it would facilitate reflection and study by members of the Commission, and in particular that it would allow inter-sessional preparation to be carried out in a way that would make the second part of a split session much more productive. For example reports or proposals debated in plenary at the first part of the session could be dealt with by the Drafting Committee at the second part. Conversely, the Drafting Committee having completed consideration of particular articles in the first part, the amended articles and accompanying commentary could be got ready for the plenary in the second half, and members will have had the opportunity to read and consider them in advance. A split session would also encourage inter-sessional work of an informal kind, and give time to special rapporteurs to reconsider proposals discussed at the first part of a session. It would allow the Drafting Committee or a working group to occupy, for example, a week at the end of the first part of a session or at the beginning of the second half, without requiring members of the Commission who are not members of that committee or group to attend. It opens the prospect of membership to those who for professional or other reasons simply cannot make the commitment to a continuous period of 12 weeks in Geneva. It is more likely that members of the Commission with other commitments (whether as government legal advisers, private sector lawyers or university law professors) may be able to spend a continuous period of 4-5 weeks in session than that they can do so for 12 weeks. Currently, some members of the Commission find it necessary to be away from Geneva for considerable periods. Although conflicting commitments can never be excluded, two shorter sessions are likely to facilitate better and more continuous attendance. In short it will be more flexible.

231. The choice is affected by financial considerations which are beyond the Commission's control. Tentative calculations suggest that a 10 week session,

split evenly between New York and Geneva, would be significantly cheaper than a continuous 12 week session. Even for a session of the same total length, it seems that a split session may not be significantly more expensive, because additional travel costs for members will be largely offset by the reduced cost of sending New York-based Secretariat personnel to Geneva.

232. In the view of the Commission, the experiment of a split session should be tried. For various reasons, including budgetary limits and the fact that 1997 is the first year of a quinquennium, however, it seems best to undertake the experiment in 1998. This will enable the proper planning of a split session - the advantages and disadvantages of which may be assessed in practice.

233. The planning of the distribution of work between the two parts of a split session is essential. Planning will necessarily be done on a year-to-year basis, and some flexibility will be necessary. But it may involve, for example, consideration in the first part of the session of reports of Special Rapporteurs and of draft articles by the Drafting Committee, and in the second part of the session of consideration in plenary of reports of the Drafting Committee, other groups and the Commission's report itself. It will be necessary for the second part of the session to end not later than the end of July in order to allow the Commission's report to the General Assembly to be produced by early September.

(d) The essential contribution of the Secretariat

234. Article 14 of the Commission's Statute provides simply that the Secretary-General shall "so far as he is able, make available staff and facilities required by the Commission to fulfil its task".

235. In practice the contribution of the Secretariat is essential. In addition to servicing the Commission and its subsidiary bodies, considerable research is undertaken by the Secretariat, often at short notice. Members of the Secretariat assist the officers of the Commission, providing the agenda, keeping records, preparing drafts of reports to plenary, etc. They assist in the preparation of the commentary to draft articles, although the Commission remains of the view that this is the primary responsibility of the Special Rapporteur. In working groups, where there may be no Special Rapporteur, this assistance is invaluable. The members of the Secretariat should be encouraged to make an even greater contribution to the Commission's work.

(e) The International Law Seminar

236. The Seminar has been a characteristic part of Commission sessions for many years, and many hundreds of younger professionals have been introduced to the United Nations and to the ILC's work through the seminar. It is hoped that it can be continued despite current financial constraints.

(f) Publishing the work of the Commission

237. The Commission's annual report to the Sixth Committee is produced within weeks of the end of the session, and subsequently reprinted in the *Yearbook*, which is the essential record of the Commission's work. The *Yearbook* contains summary records of plenary debates, the full texts of draft articles and commentaries as finally adopted, reports of Special Rapporteurs and other selected documents. Some progress has been made in catching up on the backlog with the *Yearbook*. In addition the United Nations publishes periodically a most useful survey entitled *The Work of the International Law Commission*. This summarizes the Commission's work and reprints draft articles adopted by it or, as the case may be, conventions or other texts concluded on the basis of such draft articles. The fifth edition appeared in 1996.

238. Unofficial accounts of the Commission's work appear in the international law literature. There is for example an annual review of the Commission's work published in the *American Journal of International Law* and the *Annuaire Français de Droit International*. Similar essays in the other languages of the Commission are to be encouraged.

7. The Commission's Relationship with Other Bodies (within and outside the United Nations)

239. The Commission's single most important relationship is its reporting relationship to the General Assembly through the Sixth Committee. But the Commission's Statute envisages that it may have a range of relationships with other bodies:

(a) Under articles 16 (c), 17 (2) (b) and 21 (2), the Commission must circulate questionnaires to or seek comments from the Governments on any project it is considering.

(b) Under Article 17, the Commission may consider "proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification, and transmitted to it for that purpose by the Secretary-General".

(c) Under Chapter III of its Statute the Commission has a quite general power to consult with United Nations organs on any subject within their competence, and with any other organizations, intergovernmental or otherwise, national or international, on any subject entrusted to it (see articles 25 (1), 26 (1)).

(d) In a number of cases the Commission has consulted with particular agencies in a systematic way (e.g. with FAO, on the issue of fisheries beyond territorial waters). It has also sought advice from experts (e.g. on issues of maritime delimitation and drawing of baselines).

240. It is the practice of the Commission to hear reports from delegates from the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Inter-American Juridical Committee during each session. These are useful, but they tend to be rather formal, complementary exchanges. The Commission welcomes these exchanges but believes that they could be enhanced if a short written report of the work of the organization, with relevant documents, could be circulated in advance. A brief formal exchange of views for the record could be supplemented by a less formal discussion involving members of the Commission and dealing with selected issues of interest to both bodies. Increased cooperation between these bodies and the Commission's special rapporteurs, as relevant, should also be encouraged, as well as cooperation between the Commission's secretariat and the secretariats of these bodies, and exchanges of documentation.

241. A potentially important set of relationships is currently rather neglected. We refer to the work of United Nations and other specialized bodies with legal implications or responsibilities. At least it is appropriate for bodies with specific responsibilities in a given field to be asked to exchange information and to comment on the Commission's work where relevant - but at present the various component parts of the United Nations system operate largely in isolation from each other. Another possibility might be, in effect, a joint study of a particular legal topic conducted by the Commission with the agency responsible in the given field. National law commissions have conducted such joint studies in technical fields such as customs law and insolvency. There is no a priori reason to exclude the possibility at the international level.

8. Possible revision of the Statute

242. The Commission's Statute was drafted shortly after the end of the Second World War, and although it has been amended on a number of occasions it has never been the subject of a thorough review and revision. On the whole, the Statute has been flexible enough to allow modifications in practice. For example, the Statute makes more or less adequate provision for such matters as approval of a plan of work for a topic, 334/ and the appointment of a group of members to work with the special rapporteur. 335/ With respect to other matters discussed here (e.g. split sessions), it does not preclude appropriate changes being made. Most of the changes discussed in this report can be implemented without any amendment to the Statute.

243. Nevertheless there are aspects of the Statute which warrant review and revision as the Commission approaches its fiftieth year. Some few provisions of the Statute are anachronistic, and could be removed: for example, article 26 (3), which refers to "relations with Franco Spain" and to "organizations which have collaborated with the Nazis and Fascists". The mention in article 26 (4) of intergovernmental organizations whose task is the codification of international law could be broadened beyond the Pan-American Union to include, for example, the Asian-African Legal Consultative Committee, the Hague Conference on Private International Law, and UNIDROIT. At a more substantive level the distinction drawn in articles 1, 15 and elsewhere between codification and progressive development of international law has proved to be unworkable, and the procedure for both should be expressly assimilated. In particular the freedom expressly recognized to the Commission in respect of "codification" to "adopt a plan of work appropriate to each case" (Statute, article 19 (1)) should be formally extended to all the Commission's work. A number of other substantive issues will need to be considered.

334/ Commission's Statute, article 16 (b), article 17 (2) (a), 19 (1).

335/ Ibid., article 16 (2) (d) (although this provision only relates to the period after the questionnaire has been circulated to Governments, and only "pending receipt of replies to this questionnaire"): this provision could be redrafted in more general form, and made applicable to the whole process of consideration of a topic, whether or not involving the appointment of a special rapporteur.

244. The Commission recommends that the Commission may at its next session give thought to the possibility of recommending to the General Assembly a review of the Statute to coincide with the fiftieth anniversary of the Commission in 1999.

2. Long-term programme of work

245. Having regard to the progress made and work that has been completed during this session, the Commission re-established a Working Group to assist it in selecting topics for future study.

246. The Commission adopted the report of the Working Group and decided to include it as an annex to its report. 336/

247. The Commission noted that although, in its almost 50 years of existence, it had taken up and completed numerous topics in various fields of public international law, still much remained to be done. This could be discerned both from the general list of subjects of international law as well as from the various topics raised in the Commission at one time or another as possible topics for codification and progressive development of international law.

248. In order to provide a global review of the main fields of general public international law, the Commission established a general scheme of topics classified under 13 main fields of public international law (e.g. sources, State jurisdiction, international criminal law, international organizations, international spaces, etc.). 337/ This list, not meant to be exhaustive, included topics which had already been completed by the Commission, topics taken up but "abandoned" for various reasons, topics presently under consideration and possible future topics.

249. For the present purpose, three topics had been identified as appropriate for codification and progressive development: diplomatic protection; ownership and protection of wrecks beyond the limits of national maritime jurisdiction; and unilateral acts of States. A tentative outline covering the main legal issues raised under each of the three topics was also attached. Reasons for current interest were given in the notes in each addendum.

336/ See Annex II.

337/ Ibid.

3. Duration of the next session

250. Having regard to current financial difficulties that the Organization is experiencing, the Commission decided to reduce, as an exceptional measure, its next session from 12 to 10 weeks.

251. The Commission wishes to emphasize, however, that it made full use of the time and services made available to it during its current session.

B. Cooperation with other bodies

252. The Commission was represented at the 1995 session of the Inter-American Juridical Committee by Mr. John de Saram, at the 1996 Manila session of the Asian-African Legal Consultative Committee by Mr. Kamil Idris; and at a number of meetings of the Asian-African Legal Consultative Committee in New Delhi, by Mr. P.S. Rao, the former Chairman of the Commission.

253. At its 2433rd meeting, on 28 May 1996, Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee, addressed the Commission on matters of common interest.

254. At its 2433rd meeting, on 28 May 1996, Mr. H. Schade, representative of the European Committee on Legal Cooperation, addressed the Commission and informed the Commission of its work programmes.

255. At its 2446th meeting, on 21 June 1996, Ambassador Miguel Angel Espeche Gil addressed the Commission on behalf of the Inter-American Juridical Committee.

C. Date and place of the forty-ninth session

256. The Commission agreed that its next session be held at the United Nations Office at Geneva from 12 May 1997 to 18 July 1997.

D. Representation at the fifty-first session of the General Assembly

257. The Commission decided that it should be represented at the fifty-first session of the General Assembly by its Chairman, Mr. Ahmed Mahiou. 338/

E. Contribution to the decade of international law

258. The Commission reaffirmed its decision to publish a collection of essays by members of the Commission as a contribution to the Decade of International Law. The publication would be bilingual containing essays either in English or French. The Secretariat would endeavour to ensure the translation into

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338/ At its 2473rd meeting, on 26 July 1996, the Commission requested Mr. Doudou Thiam, Special Rapporteur on the Draft Code of crimes against the peace and security of mankind to attend the fifty-first session of the General Assembly under the terms of para. 5 of General Assembly resolution 44/35.

English or French of essays submitted in other official languages. The Secretariat is requested to make appropriate arrangements, within existing resources, for the publication of the essays. Members are requested to submit as soon as possible but no later than 31 August 1996, their essays to the Chairman of the Working Group on the subject, Mr. Alain Pellet, through the Secretariat.

F. International Law Seminar

259. Pursuant to General Assembly resolution 50/45, the thirty-second session of the International Law Seminar was held at the Palais des Nations from 17 June to 5 July 1996, during the present session of the Commission. The Seminar is for students specializing in international law and for young professors or government officials intended for an academic or diplomatic career or posts in the civil service in their country.

260. Twenty-four participants of different nationalities, mostly from developing countries, were all able to take part in the session. [339] The participants in the Seminar attended meetings of the Commission and heard specially arranged lectures.

261. The Seminar was opened by the Commission's Chairman, Mr. Ahmed Mahiou. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration and organization of the Seminar.

262. The following lectures were given by members of the Commission:

Mr. Ahmed Mahiou: "The work of the International Law Commission";

Mr. Christian Tomuschat: "Pollution of the environment - A Crime under the

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[339] The following persons participated in the thirty-second session of the International Law Seminar: Ms. Isabel Albornoz Garzon (Ecuador); Ms. Soraya Elena Alvarez Nuñez (Cuba); Ms. Okia Ardanaz (Argentina); Mr. Charles Assamba Ongodo (Cameroon); Mr. Marc Arthur Asse (Haiti); Ms. Sumudu Atapattu (Sri Lanka); Mr. Mohsen Baharvand (Iran); Ms. Nino Burjanadze (Georgia); Mr. Howard Calleja (Philippines); Ms. Astrid Agerholm Danielsen (Denmark); Mr. Abdoulaye Diop (Mali); Mr. Shiva Kumar Giri (Nepal); Mr. Khoti Kamanga (Malawi); Ms. Päivi Kaukoranta (Finland); Ms. Mariko Kawano (Japan); Mr. Fadi Makki (Lebanon); Ms. Suzanne Malmström (Sweden); Mr. Phakiso Mochochoko (Lesotho); Mr. Souheil Nabil (Tunisia); Mr. Martin Ortega (Spain); Ms. Rosemary Rayfuse (Canada); Ms. Sara Haydee Sotelo Aguilar (Peru); Mr. Vincent Zakané (Burkina Faso) and Ms. Ineta Siemele (Latvia). A Selection Committee, under the chairmanship of Professor Nguyen-Huu Tru (Graduate Institute of International Relations, Geneva) met on 1 April 1996 and, after considering some 80 applications for participation in the Seminar, selected 24 of the candidates.

Code of Crimes against the Peace and Security of Mankind?"; Mr. Mochtar Kusuma-Atmadja and Mr. Alexander Yankov: "The law of the sea - recent developments"; Mr. Julio Barboza: "Liability for acts not prohibited by international law"; Mr. Igor Lukashuk: "The International Law Commission and new trends in customary international law"; Mr. Mohamed Bennouna: "The creation of an international criminal jurisdiction and State sovereignty"; Mr. James Crawford: "State responsibility"; Mr. Gudmundur Eiriksson: "New developments in international law on fisheries"; and Mr. Chusei Yamada: "Legal aspects of multilateral disarmament".

263. Lectures were also given by Mr. José Ayala Lasso, United Nations High Commissioner for Human Rights: "The mandate of the High Commissioner for Human Rights: Making human rights a reality"; Mr. Roy S. Lee, Director, Codification Division, Office of Legal Affairs and Secretary to the International Law Commission: "United Nations peace-keeping operations - Legal aspects"; Mr. François Miéville, Legal Division, International Committee of the Red Cross: "ICRC activities in regard to international humanitarian law"; Ms. Bruna Molina-Abram, Coordinator for various activities connected with operational studies in the former Yugoslavia, Centre for Human Rights: "Ad hoc Tribunals - Rwanda and the former Yugoslavia"; Mr. Jean Durieux, Chief, Promotion of Refugee Law Section, Office of the United Nations High Commissioner for Refugees: "Protection of refugees and humanitarian intervention - the UNHCR perspective".

264. Two classes on international law were given on video and the participants were then invited to make their comments.

265. The Republic and Canton of Geneva offered its hospitality to the participants after a guided visit of the Alabama and Grand Council Rooms.

266. On behalf of the Chairman, Mr. Robert Rosenstock, Vice-Chairman of the Commission, and Mr. Ulruch von Blumenthal, on behalf of the United Nations Office at Geneva, addressed the participants at the close of the Seminar. Ms. Sara Haydee Sotelo Aguilar addressed the Commission on behalf of the participants. In the course of this brief ceremony, each participant was presented with a certificate attesting to his or her participation in the thirty-second session of the Seminar.

267. The Commission noted with particular appreciation that the Governments of Cyprus, Denmark, Finland, Hungary, Iceland, Japan, Norway and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. Thanks to those contributions, it was possible to

award a sufficient number of fellowships to achieve adequate geographical distribution of participants and to bring from developing countries deserving candidates who would otherwise have been prevented from taking part in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 10 participants and partial fellowships (subsistence or travel only) to 6 participants.

268. Of the 714 participants, representing 140 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 389 have received a fellowship.

269. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. As all the available funds have been used up, the Commission recommends that the General Assembly should again appeal to States which can do so to make the voluntary contributions that are needed for the holding of the Seminar in 1997 with as broad a participation as possible.

270. The Commission noted with satisfaction that in 1996 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, despite existing financial constraints.

G. Gilberto Amado Memorial Lecture

271. With a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission, it was decided in 1971 that a memorial should take the form of a lecture to which the members of the Commission, the participants in the session of the International Law Seminar and other experts in international law would be invited.

272. The thirteenth Memorial Lecture, which was delivered on 18 June 1996 by Professor Celso Lafer, Permanent Representative of Brazil to the United Nations Office at Geneva, was on the subject: "The dispute settlement system in the World Trade Organization". It was followed by a Gilberto Amado dinner.

273. The Gilberto Amado memorial lectures have been made possible thanks to the generous contributions of the Government of Brazil, to which the Commission expressed its gratitude. It requested the Chairman to convey its gratitude to the Government of Brazil.

ANNEX I

REPORT OF THE WORKING GROUP ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Introductory Note

(1) A Working Group under the chairmanship of the Special Rapporteur, Mr. Julio Barboza, was established to consolidate work already done on the topic, and to see if provisional solutions to some unresolved questions could be arrived at, with a view to producing a single text for transmission to the General Assembly. 1/ It would then, it was hoped, be possible for the Commission at its forty-ninth session to make informed decisions as to the handling of the topic during the next quinquennium.

(2) The Working Group proceeded strictly within the framework of the topic of "International liability for injurious consequences arising out of acts not prohibited by international law". The draft articles set out below are thus limited in scope and residual in character. To the extent that existing or future rules of international law, whether conventional or customary in origin, prohibit certain conduct or consequences (e.g. in the field of the environment), those rules will operate within the field of State responsibility and will by definition fall outside the scope of the present draft articles. 2/ On the other hand, the field of State responsibility for wrongful acts is neatly separated from the scope of these articles by the permission to the State of origin to pursue the activity "at its own risk". 3/

(3) The present topic is concerned with a different issue from that of responsibility. It consists essentially of two elements. The first element is that of the prevention of transboundary harm arising from acts not prohibited by international law (in other words prevention of certain harmful consequences outside the field of State responsibility). The second element concerns the eventual distribution of losses arising from transboundary harm occurring in the course of performance of such acts or activities. The first

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1/ The Working Group consisted of Mr. Julio Barboza (Special Rapporteur, Chairman of the Working Group); Mr. Husain Al-Baharna; Mr. Mohamed Bennouna; Mr. James Crawford; Mr. Gudmundur Eiriksson; Mr. Salifou Fomba; Mr. Peter Kabatsi; Mr. Igor I. Lukashuk; Mr. Patrick L. Robinson; Mr. Robert Rosenstock; Mr. Alberto Szekely and Mr. Francisco Villagran Kramer.

2/ See article 8 of the draft articles and the commentary thereto.

3/ See article 11, in fine, and article 17.

element of the draft articles covers prevention in a broad sense, including notification of risks of harm, whether these risks are inherent in the operation of the activity or arise, or are appreciated as arising, at some later stage. [4] The second element proceeds on the basis of the principles that, on the one hand, States are not precluded from carrying out activities not prohibited by international law, notwithstanding that there may be a risk of transboundary harm arising from those activities, but that, on the other hand, their freedom of action in that regard is not unlimited, and in particular may give rise to liability for compensation or other relief in accordance with the draft articles notwithstanding the continued characterization of the acts in question as lawful. [5] Of particular significance is the principle that the victim of transboundary harm should not be left to bear the entire loss. [6]

(4) In view of the priorities attached during the forty-eighth session of the Commission to the completion of draft articles on other topics, it has not been possible for the present draft articles to be discussed by the Drafting Committee, nor will they be able to be debated in detail in plenary during this session. On the other hand the General Assembly in resolution 50/45 of 11 December 1995, paragraph 3 (c), urged the Commission to resume work on the present topic "in order to complete the first reading of the draft articles relating to activities that risk causing transboundary harm". The Working Group believes that it would be appropriate in the present circumstances for the Commission to annex to its report to the General Assembly the present report of the Working Group, and to transmit it to Governments for comment as a basis for future work of the Commission on the topic. In doing so the Commission would not be committing itself to any specific decision on the course of the topic, nor to particular formulations, although much of the substance of Chapter I and the whole of Chapter II have been approved by the Commission in earlier sessions.

(5) In making this recommendation, the Working Group was conscious of the analogous procedure adopted by the Commission in 1993 in relation to the report of the Working Group on an International Criminal Court, which was

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[4] See articles 4 and 6 and commentaries thereto.

[5] See articles 3 and 5 and commentaries thereto.

[6] See article 21 and commentary thereto.

annexed to the Report of the Commission and, without having had the opportunity in plenary to give the text a full first reading, transmitted to the General Assembly and to Governments for comment. 7/ It was on the basis of these procedures that the Commission was able to deal with the Draft Statute for an International Criminal Court, expeditiously in 1994. 8/ In the circumstances of the present topic, the Working Group believes that the recommendation set out in paragraph (4) above will make available for comment a complete text of draft articles which could form the basis for future work on this topic, and thereby put the Commission at its next session in a position to make a fully informed decision about how to proceed.

(6) It is on this basis that the Working Group commends the attached draft articles and commentaries to the Commission.

7/ See A/47/10, p. 32 and Annex.

8/ The Commission completed a final draft Statute on the establishment of an international criminal court in 1994. See A/49/10, pp. 29-160.

Part One

Text of the draft articles

CHAPTER I. GENERAL PROVISIONS

Article 1

Activities to which the present articles apply

The present articles apply to:

(a) activities not prohibited by international law which involve a risk of causing significant transboundary harm [; and

(b) other activities not prohibited by international law which do not involve a risk referred to in subparagraph (a) but none the less cause such harm;]

through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out;

(d) "affected State" means the State in the territory of which the significant transboundary harm has occurred or which has jurisdiction or control over any other place where such harm has occurred.

Article 3

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Article 4

Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm and, if such harm has occurred, to minimize its effects.

Article 5

Liability

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to compensation or other relief.

Article 6

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

Article 7

Implementation

States shall take the necessary legislative, administrative or other action to implement the provisions of the present articles.

Article 8

Relationship to other rules of international law

The fact that the present articles do not apply to transboundary harm arising from a wrongful act or omission of a State is without prejudice to the existence or operation of any other rule of international law relating to such an act or omission.

CHAPTER II. PREVENTION

Article 9

Prior authorization

States shall ensure that activities referred to in article 1 (a) are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1 (a).

Article 10

Risk assessment

Before taking a decision to authorize an activity referred to in article 1 (a), a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Article 11

Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity referred to in article 1 (a) is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 9, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Article 12

Non-transference of risk

In taking measures to prevent or minimize a risk of significant transboundary harm caused by an activity referred to in article 1 (a), States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Article 13

Notification and information

1. If the assessment referred to in article 10 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Article 14

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Article 15

Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 (a) with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 16

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 17

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 19.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Article 18

Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 17.

2. The State requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1 (a), the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Article 19

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 17, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

CHAPTER III. COMPENSATION OR OTHER RELIEF

Article 20

Non-discrimination

1. A State on the territory of which an activity referred to in article 1 is carried out shall not discriminate on the basis of nationality, residence or place of injury in granting to persons who have suffered significant transboundary harm, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief.

2. Paragraph 1 is without prejudice to any agreement between the States concerned providing for special arrangements for the protection of the interests of persons who have suffered significant transboundary harm.

Article 21

Nature and extent of compensation or other relief

The State of origin and the affected State shall negotiate at the request of either party on the nature and extent of compensation or other relief for significant transboundary harm caused by an activity referred to in article 1, having regard to the factors set out in article 22 and in accordance with the principle that the victim of harm should not be left to bear the entire loss.

Article 22

Factors for negotiations

In the negotiations referred to in article 21, the States concerned shall take into account inter alia the following factors:

(a) in the case of activities referred to in article 1 (a), the extent to which the State of origin has complied with its obligations of prevention referred to in Chapter II;

(b) in the case of activities referred to in article 1 (a), the extent to which the State of origin has exercised due diligence in preventing or minimizing the damage;

(c) the extent to which the State of origin knew or had means of knowing that an activity referred to in article 1 was being or was about to be carried out in its territory or otherwise under its jurisdiction or control;

(d) the extent to which the State of origin benefits from the activity;

(e) the extent to which the affected State shares in the benefit of the activity;

(f) the extent to which assistance to either State is available from or has been provided by third States or international organizations;

(g) the extent to which compensation is reasonably available to or has been provided to injured persons, whether through proceedings in the courts of the State of origin or otherwise;

(h) the extent to which the law of the injured State provides for compensation or other relief for the same harm;

(i) the standards of protection applied in relation to a comparable activity by the affected State and in regional and international practice;

(j) the extent to which the State of origin has taken measures to assist the affected State in minimizing harm.

Part Two

Text of draft articles with commentaries thereto

INTERNATIONAL LIABILITY FOR THE INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

General Commentary

(1) The present science-based civilization is marked by the increasingly intensive use in many different forms of resources of the planet for economic, industrial or scientific purposes. Furthermore, the scarcity of natural resources, the need for the more efficient use of resources, the creation of substitute resources and the ability to manipulate organisms and micro-organisms have led to innovative production methods, sometimes with unpredictable consequences. Because of economic and ecological interdependence, activities involving resource use occurring within the territory, jurisdiction or control of a State may have an injurious impact on other States or their nationals. This factual aspect of global interdependence has been demonstrated by events that have frequently resulted in injuries beyond the territorial jurisdiction or control of the State where the activity was conducted. The frequency with which activities permitted by international law, but having transboundary injurious consequences, are undertaken, together with scientific advances and greater appreciation of the extent of their injuries and ecological implications dictate the need for some international regulation in this area.

(2) The legal basis for establishing international regulation in respect of these activities has been articulated in State practice and judicial decisions, notably by the International Court of Justice in the Corfu Channel case in which the Court observed that there were "general and well-recognized principles" of international law concerning "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". 9/ The Trail Smelter Tribunal reached a similar conclusion when it stated that, "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the

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9/ Corfu Channel case (Merits) (United Kingdom/Albania), I.C.J. Reports 1949, p. 22.

territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence". 10/

(3) Principle 21 of the Stockholm Declaration on the Human Environment is also in support of the principle that "States have .. the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." 11/ Principle 21 was reaffirmed in General Assembly resolutions: resolution 2995 (XXVII) of 15 December 1972 on Cooperation between States in the Field of the Environment, 12/ resolution 3129 (XXVIII) of 13 December 1973 on Cooperation in the Field of the Environment concerning Natural Resources Shared by Two or More States 13/ and resolution 3281 (XXIX) of 12 December 1974 adopting the Charter of Economic Rights and Duties of States, 14/ and by Principle 2 of the Rio Declaration on Environment and Development. 15/ In addition paragraph 1 of General Assembly resolution 2995 (XXVII) further clarified Principle 21 of the Stockholm Declaration where it stated that "in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national

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10/ Trail Smelter case, United Nations, Reports of International Arbitral Awards, vol. 3, p. 1965.

11/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and Corr.), chap. I.

12/ General Assembly Official Records: Twenty-seventh Session, Supp. No. 30 (A/8730), p. 42.

13/ Ibid., Twenty-eighth Session, Supp. No. 30 (A/9030), p. 48.

14/ Ibid., Twenty-ninth Session, Supp. No. 30 (A/9631), p. 50, see in particular articles 2, 30 and 32 (2).

15/ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, document A/CONF.151/26/Rev.1 (vol. I), p. 3.

jurisdiction". 16/ Support of this principle is also found in the UNEP Principles on the Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared Between Two or More States 17/ and in a number of OECD Council Recommendations. 18/ The draft articles follow the well-established principle of sic utere tuo ut alienum non laedas (use your own property so as not to injure the property of another) in international law. As Lauterpacht stated, this maxim "is applicable to relations of States not less than those of individuals; ... it is one of those general principles of law ... which the Permanent Court is bound to apply by virtue of Article 38 of its Statute". 19/

(4) The judicial pronouncements and doctrine and pronouncements by international and regional organizations together with non-judicial forms of State practice provide a sufficient basis for the following articles which are intended to set a standard of behaviour in relation to the conduct and the effect of undertaking activities which are not prohibited by international law but could have transboundary injurious consequences. The articles elaborate, in more detail, the specific obligations of States in that respect. They recognize the freedom of States in utilizing their resources within their own territories but in such a way as not to cause significant harm to other States.

(5) The present draft articles are arranged in three chapters. Chapter I (articles 1 to 8) delimits the scope of the draft articles as a whole, defines various terms used and states the applicable general principles equally in the context of prevention of and possible liability for transboundary harm. Chapter II (articles 9 to 19) is concerned with the implementation of the

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16/ Supra note 12.

17/ United Nations document UNEP/IG 12/2 (1978) reproduced in International Legal Materials, vol. 17, p. 1097.

18/ See 1974 OECD Council Recommendation c (74) 224 concerning Transfrontier Pollution (Annex title B), OECD, OECD and the Environment, 1986, p. 142; 1974 Recommendation c (74) 220 on the Control of Eutrophication of Waters, ibid., p. 44; and 1974 Recommendation c (74) 221 on Strategies for Specific Water Pollutants Control, ibid., p. 45.

19/ Oppenheim, International Law (8th ed. by H. Lauterpacht, 1955), pp. 346-347.

principle of prevention stated in article 4 of Chapter I, including with issues of notification, consultation, etc. Chapter III (articles 20 to 22) deals with compensation or other relief for harm actually occurring, including compensation which may be available before the national courts of the State of origin or which may flow from arrangements made between that State and one or more other affected States. It is thus concerned with the implementation of the general principle of liability stated in article 5 of Chapter I.

CHAPTER I. GENERAL PROVISIONS

Article 1

Activities to which the present articles apply

The present articles apply to:

(a) activities not prohibited by international law which involve a risk of causing significant transboundary harm [; and

(b) other activities not prohibited by international law which do not involve a risk referred to in subparagraph (a) but none the less cause such harm;]

through their physical consequences.

Commentary

(1) Article 1 defines the scope of the articles. It distinguishes between two categories of activities not prohibited by international law: first, those which involve a risk of causing significant transboundary harm (article 1 (a)); and secondly, those which do not involve such a risk but which none the less do cause such harm (article 1 (b)). Subsequently, draft articles refer in terms of their particular coverage, as appropriate, either to the activities referred to in article 1 (a), or those referred to in article 1 (b), or in certain cases both.

(2) Article 1 limits the scope of the articles to activities not prohibited by international law and which involve a risk of causing, or which do in fact cause, significant transboundary harm through their physical consequences. Subparagraph (c) of article 2 further limits the scope of articles to those activities carried out in the territory or otherwise under the jurisdiction or control of a State. Since the articles are of a general and residual character, no attempt has been made at this stage to spell out in terms the activities to which they apply. The members of the Working Group had different reasons for supporting this conclusion. According to some members,

any list of activities would be likely to be under-inclusive, as well as having to be changed from time to time in the light of changing technology. Moreover - leaving to one side certain ultra-hazardous activities which are mostly the subject of special regulation, e.g. in the nuclear field or in the context of activities in outer space - the risk that flows from an activity is primarily a function of the particular application, the specific context and the manner of operation. A generic list could not capture these elements. Other members of the Working Group are more receptive to the idea of a list of activities. But they take the view that it would be premature at this stage to draw up a list, until the form, scope and content of the articles are more firmly settled. In addition, in their view, the drawing up of such a list is more appropriately done by the relevant technical experts in the context of a diplomatic conference considering the adoption of the articles as a convention.

(3) The definition of scope of activities referred to in subparagraph (a), now contains four criteria.

(4) The first criterion refers back to the title of the topic, namely that the articles apply to "activities not prohibited by international law". It emphasizes the distinction between the scope of this topic and that of the topic of State responsibility which deals with "internationally wrongful acts". See further article 8 and commentary thereto.

(5) The second criterion, found in the definition of the State of origin in article 2, subparagraph (c), is that the activities to which preventive measures are applicable are "carried out in the territory or otherwise under the jurisdiction or control of a State". Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments, 20/ the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

20/ See, for example, Principle 21 of the Stockholm Declaration, supra note 11; the United Nations Convention on the Law of the Sea of 10 December 1982, Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122, article 194, paragraph 2; Principle 2 of the Rio Declaration, supra note 15; and article 3 of the United Nations Convention on Biological Diversity of 5 June 1992, document DPI/1307.

(6) For the purposes of these articles, "territory" refers to areas over which a State exercises its sovereign authority. The Commission draws from past State practice, whereby a State has been held responsible for activities, occurring within its territory, which have injurious extraterritorial effects. In Island of Palmas, Max Huber, the sole arbitrator, stated that "sovereignty" consists not entirely of beneficial rights. A claim by a State to have exclusive jurisdiction over certain territory or events supplemented with a demand that all other States should recognize that exclusive jurisdiction has a corollary. It signals to all other States that the sovereign State will take account of the reasonable interests of all other States regarding events within its jurisdiction by minimizing or preventing injuries to them and will accept responsibility if it fails to do so:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as the corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." 21/

(7) Judge Huber then emphasized the obligation which accompanies the sovereign right of a State:

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other States; for it serves to provide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." 22/

(8) The Corfu Channel case is another case in point. There, the International Court of Justice held Albania responsible, under international

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21/ United Nations, Reports of International Arbitral Awards, vol. 2, p. 838.

22/ Ibid., p. 839.

law, for the explosions which occurred in its waters and for the damage to property and human life which resulted from those explosions to British ships. The Court, in that case, relied on international law as opposed to any special agreement which might have held Albania liable. The Court said:

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of the minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on The Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communications, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 23/

(9) Although the Court did not specify how "knowingly" should be interpreted where a State is expected to exercise its jurisdiction, it drew certain conclusions from the exclusive display of territorial control by the State. The Court stated that it would be impossible for the injured party to establish that the State had knowledge of the activity or the event which would cause injuries to other States, because of exclusive display of control by the territorial State. The Court said:

> "On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has its bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of facts and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." 24/

(10) In the Trail Smelter arbitration, the Tribunal referred to the corollary duty accompanying territorial sovereignty. In that case, although the Tribunal was applying the obligations created by a treaty between the United States and the Dominion of Canada and had reviewed many of the United States cases, it made a general statement which the Tribunal believed

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23/ Supra note 9.

24/ Ibid., p. 18.

to be compatible with the principles of international law. The Tribunal held: "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." 25/ The Tribunal quoted Professor Eagleton to the effect that "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction," and noted that international decisions, from the Alabama onward, are based on the same general principle. 26/

(11) In the Lake Lanoux award, the Tribunal alluded to the principle prohibiting the upper riparian State from altering waters of a river if it would cause serious injury to other riparian States:

> "Thus, while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstance calculated to do serious injury to the lower riparian State, such a principle has no application to the present case, since it was agreed by the Tribunal ... that the French project did not alter the waters of the Carol." 27/

(12) Other forms of State practice have also supported the principle upheld in the judicial decisions mentioned above. For example, in 1892 in a border incident between France and Switzerland, the French Government decided to halt the military target practice exercise near the Swiss border until steps had been taken to avoid accidental transboundary injury. 28/ Also following an exchange of notes, in 1961, between the United States and Mexico concerning two United States companies, Payton Packing and Casuco, located on the Mexican/United States border, whose activities were prejudicial to Mexico, the two companies took substantial measures to ensure that their operations ceased

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25/ Supra note 10.

26/ Ibid., p. 1963; C. Eagleton, Responsibility of States in International Law, p. 80.

27/ Lake Lanoux Arbitration (France-Spain), United Nations, Reports of International Arbitral Awards, vol. 12, p. 281.

28/ P. Guggenheim, "La pratique suisse (1956)", Annuaire suisse de droit international, 1957 (Zurich), vol. XIV, p. 168.

to inconvenience the Mexican border cities. 29/ Those measures included phasing out certain activities, changing working hours and establishing systems of disinfection. 30/ In 1972, Canada invoked the Trail Smelter principle against the United States when an oil spill at Cherry Point, Washington resulted in a contamination of beaches in British Columbia. 31/ There are a number of other examples of State practice along the same lines. 32/

29/ M. Whiteman, ed., Digest of International Law (Washington D.C.), vol. 6, pp. 258-259.

30/ Ibid.

31/ See Canadian Yearbook of International Law, vol. 11, pp. 333-334, 1973. The Trail Smelter principle was applied also by the District Court of Rotterdam in the Netherlands in a case against Mines Domaniales de Potasse d'Alsace. See J.G. Lammers, Pollution of International Watercourses, p. 198 (1984).

32/ In Dukovany, in former Czechoslovakia, two Soviet-designed 440 megawatt electrical power reactors were scheduled to be operating by 1980. The closeness of the location to the Austrian border led to a demand by the Austrian Ministry for Foreign Affairs for talks with Czechoslovakia about the safety of the facility. This was accepted by the Czechoslovak Government. Osterreichische Zeitschrift fur Aussenpolitik, vol. 15, p. 1 cited in G. Handl, "Conduct of abnormally dangerous activities in frontier areas: The case of nuclear power plant siting", Ecology Law Quarterly, vol. 7, 1978, p. 1. In 1973, the Belgian Government announced its intention to construct a refinery at Lanaye, near its frontier with the Netherlands. The Netherlands Government voiced its concern because the project threatened not only the nearby Netherlands national park but also other neighbouring countries. It stated that it was an established principle in Europe that, before the initiation of any activities that might cause injury to neighbouring States, the acting State must negotiate with those States. The Netherlands Government appears to have been referring to an existing or expected regional standard of behaviour. Similar concern was expressed by the Belgian Parliament, which asked the Government how it intended to resolve the problem. The Government stated that the project had been postponed and that the matter was being negotiated with the Netherlands Government. The Belgian Government further assured Parliament that it respected the principles set out in the Benelux accords, to the effect that the parties should inform each other of those of their activities that might have harmful consequences for the other member States. Belgium Parliament, Questions et réponses bulletin, 19 July 1973.

(13) Principle 21 of the Stockholm Declaration on the Human Environment 33/ and Principle 2 of the Rio Declaration on Environment and Development 34/ prescribe principles similar to those enunciated in the Trail Smelter arbitration and the Corfu Channel case.

(14) The use of the term "territory" in article 1 stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extraterritorial jurisdiction in respect of certain activities. It is the view of the Commission that, for the purposes of these articles, territorial jurisdiction is the dominant criterion. Consequently, when an activity occurs within the territory of a State, that State must comply with the preventive measures obligations. "Territory" is, therefore, taken as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially-based jurisdiction prevails. The Commission, however, is mindful of situations where a State, under international law, has to yield jurisdiction within its territory to another State. The prime example of such a situation is innocent passage of a foreign ship through the territorial sea. In such situations, if the activity leading to significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles.

(15) The concept of "territory" for the purposes of these articles is narrow and therefore the concepts of "jurisdiction" and "control" are also used. The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction.

(16) Sometimes, because of the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over a ship. The 1958 Geneva

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33/ Supra note 11.

34/ Supra note 15.

Conventions on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(17) Activities may also be undertaken in places where more than one State is authorized, under international law, to exercise particular jurisdictions that are not incompatible. The most common areas where there are functional mixed jurisdictions are the navigation and passage through the territorial sea, contiguous zone and exclusive economic zones. In such circumstance, the State which is authorized to exercise jurisdiction over the activity covered by this topic must, of course, comply with the provisions of these articles.

(18) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(19) The function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction _de jure_, such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law. Reference may be made, in this respect, to the advisory opinion by the International Court of Justice in _Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)_ case. 35/ In that case, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the de facto control of South Africa over Namibia. The Court held:

> "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." 36/

35/ _I.C.J. Reports 1971_, p. 14.

36/ Ibid., para. 118.

(20) The concept of control may also be used in cases of intervention to attribute certain obligations to a State which exercises control as opposed to jurisdiction. Intervention here refers to a short-time effective control by a State over events or activities which are under the jurisdiction of another State. It is the view of the Commission that in such cases, if the jurisdictional State demonstrates that it had been effectively ousted from the exercise of its jurisdiction over the activities covered by these articles, the controlling State would be held responsible to comply with the obligations imposed by these articles.

(21) The third criterion is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The term is defined in article 2 (see the commentary to article 2). The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken without any harm to any other State. For discussion of the term "significant", see the commentary to article 2.

(22) As to the element of "risk", this is by definition concerned with future possibilities, and thus implies some element of assessment or appreciation of risk. The mere fact that harm eventually results from an activity does not mean that the activity involved a risk, if no properly informed observer was or could have been aware of that risk at the time the activity was carried out. On the other hand, an activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it. The notion of risk is thus to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.

(23) In this context, it should be stressed that these articles as a whole have a continuing operation and effect, i.e., unless otherwise stated, they apply to activities as carried out from time to time. Thus it is possible that an activity which in its inception did not involve any risk (in the sense explained in paragraph (22)), might come to do so as a result of some event or development. For example, a perfectly safe reservoir may become dangerous as a result of an earthquake, in which case the continued operation of the reservoir would be an activity involving risk. Or developments in scientific knowledge might reveal an inherent weakness in a structure or materials which

carry a risk of failure or collapse, in which case again the present articles might come to apply to the activity concerned in accordance with their terms.

(24) The fourth criterion is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(25) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type - a consequence which does or may arise out of the very nature of the activity or situation in question, in response to a natural law. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality, not from an intervening policy decision. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

(26) Other activities involving transboundary harm. In addition, some members of the Working Group believe that the draft articles should in certain respects apply to activities not prohibited by international law which do in fact cause significant transboundary harm even though they did not at the relevant time involve a risk of doing so in the sense explained above. By no means all of the draft articles are capable of applying to the activities referred to in article 1 (b), but some may appropriately do so. Other members of the Working Group expressed doubts as to whether any of the draft articles ought to apply to the situations covered by article 1 (b), although they accepted that this was a possibility which could not be excluded *a priori* at this stage of the Commission's work. Accordingly article 1 (b) has been placed in square brackets in the text, and subsequent references to the activities covered by that subparagraph should be understood as provisional. Comment is particularly sought from Governments on the question what, if any, activities to which article 1 (b) refers should be dealt with in the draft articles, and in what respects.

(27) As in the case of activities referred to in subparagraph (a), the scope of activities in subparagraph (b) is defined by the following criteria: they are not "prohibited by international law"; they are "carried out in the territory or otherwise under the jurisdiction or control of a State; and the significant transboundary harm must have been caused by the "physical consequences" of the activities.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out;

(d) "affected State" means the State in the territory of which the significant transboundary harm has occurred or which has jurisdiction or control over any other place where such harm has occurred.

Commentary

(1) *Subparagraph (a)* defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect the Commission drew inspiration from the Code of Conduct on

Accidental Pollution of Transboundary Inland Waters, 37/ adopted by the Economic Commission for Europe in 1990. Under article I, paragraph (f), of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude". It is the view of the Commission that a definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and that the combined effect should reach a level that is deemed significant. The prevailing view in the Commission is that the obligations of prevention imposed on States should be not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity, for the activities under discussion are not prohibited by international law. The purpose is to strike a balance between the interests of the States concerned.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition identifies two poles within which the activities under these articles will fall. One pole is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other pole is where there is a high probability of causing other significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "encompasses" in the second line is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) As regards the meaning of the word "significant", the Commission is aware that it is not without ambiguity and that a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that "significant" is something more than "detectable" but need not be at the level of "serious" or "substantial". The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

37/ Document E/ECE/1225 - ECE/ENVWA/16.

(5) The ecological unity of the Planet does not correspond to political boundaries. In carrying out lawful activities within their own territories States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable. Considering that the obligations imposed on States by these articles deal with activities that are not prohibited by international law, the threshold of intolerance of harm cannot be placed below "significant".

(6) The idea of a threshold is reflected in the Trail Smelter award which used the words "serious consequences" 38/ as well as the Tribunal in the Lake Lanoux arbitration which relied on the concept "seriously" (gravement). 39/ A number of conventions have also used "significant", "serious" or "substantial" as the threshold. 40/ "Significant" has also been used in other legal instruments and domestic law. 41/

38/ Supra note 10.

39/ Supra note 27.

40/ See, for example, article 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988, International Legal Materials, vol. 28, p. 868; articles 2 (1) and (2) of the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 (E/ECE/1250), reprinted in International Legal Materials, vol. 30, p. 800; article I (b) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, supra note 37.

41/ See, for example, operative paras. 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment, supra note 12; Recommendation of the Council of the Organization for Economic Co-operation and Development on Principles Concerning Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relation to Transfrontier Pollution: Leading OECD Documents, p. 35, reproduced also in International Legal Materials, vol. 14, p. 246; The Helsinki Rules on the Uses of the Waters of International Rivers, art. 10, International Law Association, Report of the fifty-second Conference, Helsinki, 1966, p. 496; and art. 5 of the draft Convention on industrial and agricultural use of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965, OAS, Rios y Lagos Internacionales, p. 132 (4th ed. 1971).

See also the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2541, T.I.A.S. No. 9856; and the 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, art. 7, in International Legal Materials, vol. 22, p. 1025 (1983).

(7) The Commission is also of the view that the term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation, at a particular time might not be considered "significant" because at that specific time, scientific knowledge or human appreciation for a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

(8) *Subparagraph (b)* defines "transboundary harm" as meaning harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". It, however, makes clear that the intention is to be able to draw a line and clearly distinguish a State to which an activity covered by these articles is attributable from a State which has suffered the injurious impact. Those separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries.

(9) In *subparagraph (c)*, the term "State of origin" is introduced to refer to the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out (see commentary to article 1, paras. (4) to (20)).

(10) In *subparagraph (d)*, the term "affected State" is defined to mean the State on whose territory or in other places under whose jurisdiction or control significant transboundary harm occurs. There may be more than one such affected State in relation to any given activity.

The United States has also used the word "significant" in its domestic law dealing with environmental issues. See the American Law Institute, *Restatement of the Law*, Section 601, Reporter's Note 3, pp. 111-112.

Article 3

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Commentary

(1) This article sets forth the principle that constitutes the basis for the entire topic. It is inspired by Principle 21 of the Declaration of the United Nations Conference on the Human Environment 42/ and Principle 2 of the Rio Declaration on Environment and Development. 43/ Both principles

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42/ Principle 21 of the Declaration of the United Nations Conference on the Human Environment reads as follows:

> "States have, in accordance with the Charter of the United Nations and the principles of the international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Supra note 11.

43/ Principle 2 of the Rio Declaration on Environment and Development reads as follows:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Supra note 15.

This principle has also been enunciated in article 193 of the United Nations Convention on the Law of the Sea. That article reads as follows:

> "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment."

Supra note 20.

affirm the sovereign right of States to exploit their own resources, in accordance with the Charter of the United Nations and the principles of international law.

(2) The adopted drafting generalizes Principle 21, since article 3 is not limited only to activities directed to the exploitation of resources, but encompasses within its meaning all activities in the territory or otherwise under the jurisdiction or control of a State. On the other hand, the limitations referring to the freedom of a State to carry on or authorize such activities are made more specific than in Principle 21, since such limitations are constituted by the general obligation that a State has to prevent or minimize the risk of causing significant transboundary harm as well as the specific State obligations owed to other States in that regard.

(3) The activities to which this article applies are defined in article 1. The present article speaks of risk of causing significant transboundary harm, while the other two Principles - Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration - speak of causing transboundary damage. In practical terms, however, prevention or minimization of risk of causing harm is the first step in preventing the harm itself.

(4) In that sense, the principle expressed in this article goes further in the protection of the affected State's rights and interests and is specifically applicable to hazardous activities, that is, activities which involve a risk of causing transboundary harm.

(5) The general obligation to prevent transboundary harm is well established in international law, 44/ but article 3 recognizes a general obligation for the State of origin to prevent or minimize the risk of causing transboundary harm, which means that the State must ensure that the operator of an activity as defined by articles 1 and 2 takes all adequate precautions so that transboundary harm will not take place, or if that is impossible due to the nature of the activity, then the State of origin must take all necessary steps to make the operator take such measures as are necessary to minimize the risk.

(6) Article 10 of the Legal Principles for Environmental Protection and Sustainable Development, which was drafted by the Experts Group of

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44/ This general obligation of States has its foundation in international practice. See supra, General Commentary, and the commentary to article 1.

Environmental Law of the World Commission on Environment and Development is consistent with the content of the preceding paragraph. Article 10 provides that:

> "States shall, without prejudice to the principles laid down in Articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm - i.e. harm which is not minor or insignificant." 45/

(7) The commentary to that article provides that:

> "Subject to certain qualifications to be dealt with below, Article 10 lays down the well-established basic principle governing transboundary environmental interferences which causes, or entails a significant risk of causing, substantial harm in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction." 46/

(8) The commentary to that article further provides that this principle is an implicit consequence of the duty not to cause transboundary harm:

> "It should be noted that the principle formulated above does not merely state that States are obliged to prevent or abate transboundary environmental interferences which actually cause substantial harm, but also that they are obliged to prevent or abate activities which entail a significant risk of causing such harm abroad. The second statement states as a matter of fact explicitly what must already be deemed to be implicit in the duty to prevent transboundary environmental interferences actually causing substantial harm and serves to exclude any misunderstanding on this point." 47/

(9) Making explicit what is implicit in the above-mentioned general obligation of prevention is already an important advance in the law referring

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45/ Environmental Protection and Sustainable Development, Legal Principles and Recommendations, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development. (London, Dordrecht and Boston, Graham and Trotham, Nijhoff), 1986, p. 75. Emphasis added.

46/ Ibid., p. 75. Emphasis added.

47/ Ibid., p. 78. However, "[w]hile activities creating a significant risk of causing substantial harm must in principle be prevented or abated, it may well be that, in the case of certain dangerous activities, the unlawfulness will be taken away when all possible precautionary measures have been taken to preclude the materialization of the risk and the benefits created by the activity must be deemed to far outweigh the benefits to be obtained by eliminating the risk which would require putting an end to the activity itself.", p. 79.

to transboundary harm, since it gives clear foundation to all other obligations of prevention, and particularly to those of notification, exchange of information and consultation, which originate in the right of the presumably affected State - corresponding to this general obligation of prevention - to participate in the general process of prevention.

(10) The article has two parts. The first part affirms the freedom of action by States and the second part addresses the limitations to that freedom. The first part provides that the freedom of States to conduct or permit activities in their territory or under their jurisdiction or control is not unlimited. This is another way of stating that the freedom of States in such matters is limited. The Commission however, felt that it would be more appropriate to state the principle in a positive form, which presupposes the freedom of action of States, rather than in a negative form which would have emphasized the limitation of such freedom.

(11) The second part of the article enumerates two limitations to such State freedom. First, such freedom is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm. Second, such freedom is subject to any specific obligations owed to other States in that regard. The words "in that regard" refer to preventing or minimizing the risk of causing significant transboundary harm.

(12) The first limitation to the freedom of States to carry on or permit activities referred to in article 1 is set by the general obligation of States to prevent or minimize the risk of causing significant transboundary harm. The general obligation stipulated under this article should be understood as establishing an obligation of conduct. The article does not require that a State guarantee the absence of any transboundary harm, but that it takes all the measures required to prevent or minimize such harm. This understanding is also consistent with the specific obligations stipulated in various articles on prevention.

(13) The meaning and the scope of the obligation of due diligence are explained in paragraphs (4) to (13) of the commentary to article 4.

Article 4

Prevention

> States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm and, if such harm has occurred, to minimize its effects.

Commentary

(1) This article, together with article 6, provides the basic foundation for the articles on prevention. The articles set out the more specific obligations of States to prevent or minimize significant transboundary harm, or, if such harm has occurred, to minimize its effects. The present article is in the nature of a statement of principle. It provides that States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm or, if such harm has occurred, to minimize its effects. The word "measures" refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm.

(2) As a general principle, the obligation in article 4 to prevent or minimize the risk applies only to activities which involve a risk of causing significant transboundary harm, as those terms are defined in article 2. In general, in the context of prevention, a State does not bear the risk of unforeseeable consequences to other States of activities not prohibited by international law which are carried on its territory or under its jurisdiction or control. On the other hand the obligation to "take appropriate measures to prevent or minimize" the risk of harm cannot be confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities which involve such a risk, and this obligation is of a continuing character.

(3) This article, then, sets up the principle of prevention that concerns every State in relation to activities covered by article 1 (a). The modalities whereby the State of origin may discharge the obligations of prevention which have been established include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State has adopted. See article 7 and the commentary thereto.

(4) The obligation of States to take preventive or minimization measures is one of due diligence, requiring States to take certain unilateral measures to prevent or minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied with its obligation under the present articles.

(5) An obligation of due diligence as the standard basis for the protection of the environment from harm, can be deduced from a number of international

conventions 48/ as well as from the resolutions and reports of international conferences and organizations. 49/ The obligation of due diligence was discussed in a dispute which arose in 1986 between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries. 50/

(6) In the Alabama case (United States v. United Kingdom), the Tribunal examined two different definitions of due diligence submitted by the parties. The United States defined due diligence as:

> "[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, ..." 51/

48/ See for example, article 194, paragraph 1, of the United Nations Convention on the Law of the Sea, supra note 20; articles I, II, and VII (2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, International Legal Materials, vol. 11, p. 1294; article 2 of the Vienna Convention for the Protection of the Ozone Layer, ibid., vol. 26, p. 1529; article 7, paragraph 5, of the Convention on the Regulation of Antarctic Mineral Resources Activities, supra note 40; article 2, paragraph 1, of the Convention on Environmental Impact Assessment in a Transboundary Context, ibid.; and article 2, paragraph 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. 31, p. 1313.

49/ See Principle 21 of the World Charter for Nature, General Assembly resolution 37/7 adopted on 28 October 1982; Principle VI of Draft Principles relating to weather modification prepared by the WHO and by UNEP, in Digest of United States Practice in International Law, 1978, p. 1205.

50/ See New York Times, 11 November 1986, p. A 1; 12 November 1986, p. A 8; 13 November 1986, p. A 3. See also Alexander Kiss, "Tchernobale" ou la pollution accidentelle du Rhin par les produits chimiques, in Annuaire Français de Droit International, vol. 33, 1987, pp. 719-727.

51/ The Geneva Arbitration (The Alabama case) in J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. I, 1898, pp. 572-73.

(7) The United Kingdom defined due diligence as "such care as Governments ordinarily employ in their domestic concerns". 52/ The Tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The Tribunal stated that "[the] British Case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient". 53/

(8) The extent and the standard of the obligation of due diligence was also elaborated on by Lord Atkin in the case of Donoghue v. Stevenson as follows:

> "The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question." 54/

(9) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus States are under an obligation to take unilateral measures to prevent or minimize the risk of significant transboundary harm by activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, second, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

(10) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which

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52/ Ibid., p. 612.

53/ Ibid.

54/ [1932] A.C., p. 580 (H.L.(Sc)).

may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climate conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.

(11) The Commission takes note of Principle 11 of the Rio Declaration on Environment and Development which states:

> "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries." 55/

(12) Similar language is found in Principle 23 of the Stockholm Declaration. That Principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community". 56/ It is the view of the Commission that the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to discharge a State from its obligation under these articles.

(13) The obligation of the State is, first, to attempt to design policies and to implement them with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize such harm. In the view of the Commission, the word "minimize" should be understood in this context as meaning to pursue the aim of reducing to the lowest point the possibility of harm.

55/ *Supra* note 15.

56/ *Supra* note 11.

Article 5

Liability

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to compensation or other relief.

Commentary

(1) The present articles are concerned with activities which are not prohibited in international law, either intrinsically or as to their effects. That being so, there can - as it were by definition - be no question that the occurrence of significant transboundary harm would give rise to a case of State responsibility, which is concerned with acts which in one respect or another are prohibited by international law, that is, by unlawful acts. See also article 8 and the commentary thereto.

(2) On the other hand, where States carry out activities which are prone to cause and which do cause significant transboundary harm - even if those activities or their effects are not unlawful - a question of compensation for the harm arises, and it is this element which is primarily reflected in the term "international liability". Outside the realm of State responsibility the issue is not one of reparation (in the sense defined in article 41 of the Draft Articles on State Responsibility). But compensation or other relief (for example a modification in the operation of the activity so as to avoid or minimize future harm) ought in principle to be available. Otherwise States would be able to externalize the costs of their activities through inflicting some of those costs, uncompensated, on third parties who derive no benefit from those activities, who have no control over whether or not they are to occur but who suffer significant transboundary harm. Thus article 5 states as a basic principle that liability to make compensation or provide other relief may arise from significant transboundary harm caused by activities to which article 1 applies. This basic principle is, however, qualified by the phrase "in accordance with the present articles". The extent to which the articles give rise to compensation or other relief is as stated in Chapter III. This is, of course, without prejudice to any obligation to make compensation or to provide other relief which may exist independently of the present articles such as, for example, in accordance with a treaty to which the States concerned are parties.

(3) It should be noted that in its present formulation the principle stated in article 5 applies both to activities involving risk (article 1 (a)) and

those which cause harm even though the risk that they would do so was not earlier appreciated (article 1 (b)). It is true that the rationale for liability articulated in the preceding paragraph applies more clearly to activities covered by article 1 (a) as compared with those covered by article 1 (b). However, even where activities did not at the time they were carried out involve a risk of causing significant transboundary harm, in the sense defined in article 2, the question of possible compensation or other relief is not to be excluded. To limit liability only to cases involving risk would be to say - a contrario - that third States are to be left to bear any losses otherwise incurred as a result of the activities of States of origin (not prohibited by international law), no matter how serious those losses or what the other circumstances may have been. As a matter of general application, a rule of strict liability for all and any losses covered by activities lawfully carried out on the territory of a State or under its jurisdiction or control would be difficult, if not impossible, to sustain. Of course, a treaty may incorporate such a rule, but that does not necessarily show what the rule of general international law would be apart from the treaty. What can be said, however, is that where significant transboundary harm occurs, even though arising from a lawful activity and even though the risk of that harm was not appreciated before it occurred, none the less the question of compensation or other relief is not to be excluded. There is no rule in such circumstances that the affected third State must bear the loss. Hence the principle in article 5 can properly apply to all activities covered by article 1, bearing in mind that the formulations in Chapter III of these articles dealing with compensation or other relief are very flexibly drafted and do not impose categorical obligations. This position is however provisional for the reasons explained in paragraph (26) of the commentary to article 1.

(4) The principle contained in article 5 is not new to the Commission. At its fortieth session, in 1988, the Commission stated the following:

> "There was general agreement that the principles identified by the Special Rapporteur in paragraph 86 of his Fourth Report were relevant to the topic and were acceptable in their general outline. Those principles were as follows: (1) The draft articles must ensure each State as much freedom of choice within its territory as is compatible with the rights and interests of other States. (2) The protection of such rights and interests require the adoption of measures of prevention and if injury

> nevertheless occurs, measures of reparation. (3) In so far as may be consistent with those two principles, the innocent victim should not be left to bear his loss or injury." 57/

(5) The principle of liability and reparation is a necessary corollary and complement to article 4. That article obliges States to prevent or minimize the risk from activities that are not prohibited by international law. Article 5, on the other hand, establishes an obligation to provide compensation or other relief whenever significant transboundary harm occurs. The article thus rejects a regime which would permit the conduct of activities hazardous to other States without any form of compensation or other relief when harm occurs.

(6) The principle of liability is without prejudice to the question of: (a) the entity that is liable and must make reparation; (b) the forms and the extent of reparation; (c) the harm that is subject to reparation; and (d) the basis of liability.

(7) These matters are dealt with in various ways in Chapter III of these articles, pursuant to which these issues may be dealt with by the law of the State of origin and through its courts on the basis of non-discrimination (see article 20 and the commentary thereto), or by negotiation between the State of origin and the affected State or States on the basis of some general criteria there laid down (see articles 21 and 22 and the commentaries thereto).

(8) In fact, in international practice there are several ways of remedying the transboundary harm caused by a hazardous activity to persons or property, or the environment. One is the absolute liability of the State, as in the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972, 58/ so far the only case of State absolute liability to be specified by a multilateral treaty. Another way is to channel liability through the operator, leaving the State out of the picture, as in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 9 March 1993. 59/ Still another is to assign to the State some subsidiary liability for that amount of compensation not satisfied by the operator, such as the Convention for the Third Party Liability in the

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57/ Yearbook ... 1988, vol. II (Part Two), document A/CN.4/10, para. 83.

58/ United Nations, Treaty Series, vol. 961, p. 187.

59/ European Treaty Series, No. 150.

Field of Nuclear Energy of 29 July 1960 60/ and the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963. 61/

(9) In other contests, the State may be responsible only in cases where due diligence is breached, in a way similar to that of article 7 of the draft articles on the Law of the Non-navigational Uses of International Watercourses, 62/ although such a rule may impose an obligation within the framework of State responsibility (and therefore falling outside the scope of the present articles).

(10) In including this article within the set of fundamental principles of the topic, the Commission takes careful note of Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration in which States are encouraged to cooperate in developing further international law regarding liability and compensation for environmental damage caused by activities within their jurisdiction or control to areas beyond their national jurisdiction. These Principles demonstrate aspirations and preferences of the international community.

(11) It must be noted that the term used is "compensation or other relief". Compensation, i.e. payment of a sum of money, is hardly applicable to some instances of remedying environmental harm, where restoration is the best solution. Restoration, which is an attempt of returning to the *status quo ante*, may be considered as a form of *restitutio naturalis*. Also in the field of environmental harm, the introduction into a damaged ecosystem of certain equivalent components to those diminished or destroyed is not a monetary compensation, although it may be considered a form of relief. Such a solution is envisaged in certain instruments. 63/

(12) There is significant treaty practice by which States have either identified a particular activity or substance with injurious transboundary consequences and have established a liability regime for the transboundary

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60/ United Nations, *Treaty Series*, vol. 956, p. 251.

61/ Ibid., vol. 1063, p. 265.

62/ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), p. 236.

63/ See for example, article 2 (8) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, *supra* note 59.

harm. Activities involving oil transportation, oil pollution and nuclear energy or material are prime targets of these treaties. 64/ Some conventions address the question of liability resulting from activities other than those involving oil or nuclear energy or material. 65/ Many other treaties refer to the issue of liability without any further clarification as to the substantive or procedural rules of liability. These treaties recognize the relevance of the liability principle to the operation of the treaty without necessarily articulating a precise principle of liability. 66/

64/ See in particular the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, IMOC, Official Records of the International Legal Conference on Marine Pollution Damage, London, 1969; the 1984 Protocol to the 1969 Convention, IMO, International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, LEG/CONF.6/66 of 25 May 1984; Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources of 17 December 1976, UNEP, Selected Multilateral Treaties in the Field of the Environment, p. 474; Convention on Third Party Liability in the Field of Nuclear Energy, supra note 61; Convention on the Liability or the Operators of Nuclear Ships, of 25 May 1962, IAEA, International Conventions relating to Civil Liability for Nuclear Damage, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 34; Vienna Convention on Civil Liability for Nuclear Damage, supra note 62; Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 December 1971, United Nations, Treaty Series, vol. 974, p. 255; and the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) of 10 December 1989, Revue de droit uniform (UNIDROIT), 1989, p. 280.

65/ See the Convention on International Liability for Damage Caused by Space Objects, supra note 26, and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, supra note 59.

66/ See in this context the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution of 24 April 1978, United Nations, Treaty Series, vol. 1140, p. 133; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972, ibid., vol. 1046, p. 120; Convention for the Protection of the Mediterranean Sea against Pollution of 16 February 1976, UNEP, Selected Multilateral Treaties in the Field of the Environment, p. 448; Convention on the Protection of the Marine Environment of the Baltic Sea Area of 9 April 1992, [IMO 1] LDC.2/Circ. 303; Convention on the Protection of the Black Sea Against Pollution of 21 April 1992, ibid., Circ. 302; Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992, International Legal Materials, vol. 31, p. 1330; and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, supra note 40.

Other treaties contemplate that a further instrument will be developed by the parties addressing questions of liability arising under the treaties. 67/

(13) The concept of liability has also been developed to a limited extent in State practice. For example, in the Trail Smelter case, the smelter company was permitted to continue its activities, but the Tribunal established a permanent regime which called, under certain conditions, for compensation for injury to the United States interests arising from fume emission even if the smelting activities conformed fully to the permanent regime as defined in the decision:

> "The Tribunal is of the opinion that the prescribed regime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future. But since the desirable and expected result of the regime or measures of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers to Question No. 4 ...: (a) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of Smelter to comply with the regulations herein prescribed or notwithstanding the maintenances of the regime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity ..." 68/

(14) In the Lake Lanoux case, on the other hand, the Tribunal, responding to Spain's allegation that the French projects would entail an abnormal risk to Spanish interests, stated as a general matter that responsibility would not arise as long as all possible precautions against the occurrence of an

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67/ See for example, the Convention on the Regulation of Antarctic Mineral Resource Activities which makes the development of liability rules a precondition for the exploration and exploitation of mineral resources of Antarctica, supra note 40. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 provides in article 12 that States Parties shall develop a protocol on liability and compensation, International Legal Materials, vol. 28, p. 657. See also Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 29 January 1991 which also provides that States Parties to the Convention shall develop a protocol on liability and compensation, ibid., vol. 30, p. 773.

68/ Supra note 10, pp. 1980-1981. Emphasis added.

injurious event had been taken. 69/ The Tribunal made a brief reference to the question of dangerous activities, by stating: "It has not been clearly affirmed that the proposed works [by France] would entail an abnormal risk in neighbourly relations or in the utilization of the waters." This passage may be interpreted as meaning that the Tribunal was of the opinion that abnormally dangerous activities constituted a special problem, and that, if Spain had established that the proposed French project would entail an abnormal risk of transboundary harm to Spain, the decision of the Tribunal might have been different.

(15) In the Nuclear Tests case, the International Court of Justice duly recited Australia's statement of its concerns that

> "the atmospheric nuclear explosions carried out by France in the Pacific had caused widespread radioactive fallout on Australian territory and elsewhere in the southern hemisphere, had given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radioactive material deposited on Australian territory could be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere created anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment could never be undone and would be irremediable by any payment of damages; and any infringement by France of

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69/ The Tribunal stated:

> "The question was lightly touched upon in the Spanish counter memorial, which underlined the 'extraordinary complexity' of procedures for control, their 'very onerous' character, and the 'risk of damage or of negligence' in the handling of the watergates, and of obstruction in the tunnel. But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of article 9."

Supra note 27, pp. 123-124, paragraph 6.

> the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace could not be undone". 70/

(16) In his dissenting opinion, Judge Ignacio-Pinto, while expressing the view that the Court lacked jurisdiction to deal with the case, stated that:

> "if the Court were to adopt the contention of the Australian request it would be near to enforcing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States." 71/

(17) He further stated that "[i]n the present state of international law, the 'apprehension' of a State, or 'anxiety', 'the risk of atomic radiation', do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests." 72/ In his view, "[t]hose who hold the opposite view may perhaps represent the figure-heads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of law." 73/

(18) In a number of incidents States have, without admitting any liability, paid compensation to the victims of significant transboundary harm. In this context, reference should be made to the following.

(19) The series of United States nuclear tests on Eniwetok Atoll on 1 March 1954 caused injuries extending far beyond the danger area. They injured Japanese fishermen on the high seas and contaminated a great part of the atmosphere and a considerable quantity of fish, thus seriously disrupting the Japanese fish market. Japan demanded compensation. In a note dated

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70/ Nuclear Tests case (Australia v. France), (Order of 22 June 1973), I.C.J. Reports 1973, p. 104. The Court did not rule on the merits of the case.

71/ Ibid., p. 132.

72/ Ibid.

73/ Ibid.

4 January 1955, the United States Government, completely avoiding any reference to legal liability, agreed to pay compensation for harm caused by the tests. 74/

(20) In the case of the injuries sustained in 1954 by the inhabitants of the Marshall Islands, then a Trust Territory administered by the United States, the United States agreed to pay compensation. A report of the Committee on Interior and Insular Affairs of the United States Senate stated that, owing to an unexpected wind shift immediately following the nuclear explosion, the 82 inhabitants of the Rongelap Atoll had been exposed to heavy radioactive fallout. After describing the injuries to persons and property suffered by the inhabitants and the immediate and extensive medical assistance provided by the United States, the report concluded: "It cannot be said, however, that the compensatory measures heretofore taken are fully adequate ...". The report disclosed that in February 1960 a complaint against the United States had been lodged with the high court of the Trust Territory with a view to obtaining $8,500,000 as compensation for property damage, radiation sickness, burns, physical and mental agony, loss of consortium and medical expenses. The suit had been dismissed for lack of jurisdiction. The report indicated, however, that bill No. 1988 (on payment of compensation) presented in the House of Representatives was "needed to permit the United States to do justice to these people". On 22 August 1964, President Johnson signed into law an act

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74/ The United States Government stated that:

> "The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained. ... [T]he United States of America hereby tenders, ex gratia, to the Government of Japan, without reference to the question of liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands, in 1954.
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> ...
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> It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, national or juridical entities for any and all injuries, losses or damage arising out of the said nuclear tests."

See Department of State Bulletin, Washington, D.C., vol. 32, No. 812, 17 January 1955, pp. 90-91.

under which the United States assumed "compassionate responsibility to compensate inhabitants of the Rongelap Atoll, in the Trust Territory of the Pacific Islands, for radiation exposures sustained by them as a result of a thermonuclear detonation at Bikini Atoll in the Marshall Islands on March 1, 1954" and authorized $950,000 to be paid in equal amounts to the affected inhabitants of Rongelap. 75/ According to another report, in June 1982 the Reagan Administration was prepared to pay $100 million to the Government of the Marshall Islands in settlement of all claims against the United States by islanders whose health and property had been affected by United States nuclear weapons tests in the Pacific between 1946 and 1963. 76/

(21) In 1948, a munitions factory in Arcisate, in Italy, near the Swiss frontier, exploded and caused varying degrees of damage in several Swiss communes. The Swiss Government demanded reparation from the Italian Government for the damage sustained; it invoked the principle of good neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of an international border. 77/

(22) In 1971, the Liberian tanker Juliana ran aground and split apart off Niiagata, on the west coast of the Japanese island of Honshu. The oil of the tanker washed ashore and extensively damaged local fisheries. The Liberian Government (the flag State) offered 200 million yen to the fishermen for damage, which they accepted. 78/ In this affair, the Liberian Government accepted the claims for damage caused by the act of a private person. It seems that no allegations of wrongdoing on the part of Liberia were made at an official diplomatic level.

(23) Following the accidental spill of 12,000 gallons of crude oil into the sea at Cherry Point, in the State of Washington, and the resultant pollution of Canadian beaches, the Canadian Government addressed a note to the United States Department of State in which it expressed its grave concern

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75/ Supra note 29, vol. 4, p. 567.

76/ International Herald Tribune, 15 June 1982, p. 5, col. 2.

77/ Guggenheim, supra note 28, p. 169.

78/ The Times, London, 1 October 1974; Revue générale de droit international public, Paris, vol. 80, 1975, p. 842.

about this "ominous incident" and noted that "the Government wishes to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, will be paid by those legally responsible". 79/ Reviewing the legal implications of the incident before the Canadian Parliament, the Canadian Secretary of State for External Affairs stated:

> "We are especially concerned to ensure observance of the principle established in the 1938 *Trail Smelter* arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the *Trail Smelter* case and we would expect that the same principle would be implemented in the present situation. Indeed, this principle has already received acceptance by a considerable number of States and hopefully it will be adopted at the Stockholm Conference as a fundamental rule of international environmental law." 80/

(24) Canada, referring to the precedent of the *Trail Smelter* case, claimed that the United States was responsible for the extraterritorial damage caused by acts occurring under its territorial control, regardless of whether the United States was at fault. The final resolution of the dispute did not involve the legal principle invoked by Canada; the private company responsible for the pollution offered to pay the costs of the clean-up operations.

(25) In 1973, a major contamination occurred in the Swiss canton of Bâle-Ville owing to the production of insecticides by a French chemical factory across the border. The contamination caused damage to the agriculture and environment of that canton and destroyed some 10,000 litres of milk production per month. 81/ The Swiss Government apparently intervened and negotiated with the French authorities in order to halt the pollution and obtain compensation for the damage.

(26) During negotiations between the United States and Canada regarding a plan for oil prospecting in the *Beaufort Sea*, near the Alaskan border, the Canadian Government undertook to guarantee payment of any damage that might be caused

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79/ *Canadian Yearbook of International Law* 1973 (Vancouver), vol. XI, pp. 333-334.

80/ Ibid., p. 334.

81/ See *Annuaire suisse de droit international, 1974*, Zurich, vol. 30, p. 147. The facts about the case and the diplomatic negotiations that followed are difficult to ascertain.

in the United States by the activities of the private corporation that was to undertake the prospecting. 82/ Although the private corporation was to furnish a bond covering compensation for potential victims in the United States, the Canadian Government accepted liability on a subsidiary basis for payment of the cost of transfrontier damage should the bonding arrangement prove inadequate. 83/

(27) In connection with the construction of a highway in Mexico, in proximity to the United States border, the United States Government, considering that, notwithstanding the technical changes that had been made in the project at its request, the highway did not offer sufficient guarantees for the security of property situated in United States territory and reserved its rights in the event of damage resulting from the construction of the highway. In a note addressed on 29 July 1959 to the Mexican Minister of Foreign Relations, the United States Ambassador to Mexico concluded:

> "In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway." 84/

(28) In the case of the Rose Street Canal, both the United States and Mexico reserved the right to invoke the accountability of the State whose construction activities might cause damage in the territory of the other State. 85/

(29) In the correspondence between Canada and the United States regarding the United States Cannikin underground nuclear tests on Amchitka, Canada reserved its rights to compensation in the event of damage. 86/

(30) Treaty practice shows a clear tendency in imposing no-fault (sine delicto) liability for extraterritorial harm on the operators of

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82/ International Canada, Toronto, vol. 7, 1976, pp. 84-85.

83/ Ibid.

84/ Whiteman, supra note 29, vol. 6, p. 262.

85/ Ibid., p. 264.

86/ International Canada, Toronto, vol. 2, 1971, pp. 97 and 185.

activities or their insurers. 87/ This is standard practice in treaties primarily concerned with commercial activities. Some conventions, regulating activities undertaken mostly by private operators, impose certain obligations upon the State to ensure that its operators abide by those regulations. If the State fails to do so, it is held liable for the injuries the operator causes either for the whole compensation or that portion of it not satisfied by the operator. 88/

(31) On the other hand, the 1972 Convention on International Liability for Damage Caused by Space Objects 89/ holds the launching State absolutely liable for transboundary damage. This Convention is unique because, at the time of its conclusion, it was anticipated that the activities being regulated, because of their nature, would be conducted only by States. The Convention is further unique in that it allows the injured party the choice as to whether to pursue a claim for compensation through domestic courts or to make a direct claim against the State through diplomatic channels.

(32) It must be noted that the trend of requiring compensation is pragmatic rather than grounded in a consistent concept of liability. Liability of private operators, their insurers, and possibly States takes many forms. None

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87/ See for example, in the area of oil pollution, the 1969 International Convention on Civil Liability for Oil Pollution Damage, supra note 64, the 1984 Protocol to the 1969 Convention, ibid.; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971, United Nations, Treaty Series, vol. 1110, p. 57; the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, supra note 64. - In the area of nuclear energy and material, the Convention on Third Party Liability in the Field of Nuclear Energy, supra note 60; the Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy, UNEP, Selected Multilateral Treaties in the Field of the Environment, p. 171; the Convention on the Liability of Operators of Nuclear Ships, supra note 64; the Vienna Convention on Civil Liability for Nuclear Damage, supra note 62; the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, supra note 64. - In the area of other activities, the Convention on the International Liability for Damage Caused by Space Objects, supra note 26; and the Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment, supra note 59.

88/ See, for example, article III of the Convention on the Liability of Operators of Nuclear Ships, supra note 64, and article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities, supra note 40.

89/ Supra note 58.

the less, it is legitimate to induce from the rather diverse practice surveyed above the recognition - albeit on some occasions de lege ferenda - of a principle that liability should flow from the occurrence of significant transboundary harm arising from activities such as those referred to in article 1, even though the activities themselves are not prohibited under international law - and are therefore not subject to the obligations of cessation or restitutio in integrum. On the other hand that principle cannot, in the present state of international practice, be affirmed without qualification, hence the need to refer to the implementation of the general principle through the provisions contained elsewhere in these articles.

Article 6

Cooperation

> States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

Commentary

(1) The principle of cooperation between States is essential in designing and implementing effective policies to prevent or minimize the risk of causing significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration and Principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation have been stipulated in the articles in Chapter II, in particular articles 13 to 18. They envisage the participation of the affected State, which is indispensable to enhance the effectiveness of any preventive action. The affected State may know better than anybody else which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem, etc.

(2) The article requires States concerned to cooperate in good faith. Paragraph 2 of Article 2 of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The Vienna Convention on the Law of Treaties and the Convention on Succession of States in Respect of Treaties

declare in their preambles that the principle of good faith is universally recognized. In addition article 26 and paragraph 1 of article 31 of the Vienna Convention on the Law of Treaties acknowledge the essential place of this principle in the structure of treaties. The decision of the International Court of Justice in the Nuclear Tests case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith". 90/ This dictum of the Court implies that good faith applies also to unilateral acts. 91/ Indeed the principle of good faith covers "the entire structure of international relations". 92/

(3) The arbitration tribunal established in 1985 between Canada and France on disputes concerning filtering with the Gulf of St. Lawrence La Bretagne, held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively. 93/

(4) The words "States concerned" refer to the State of origin and the affected State or States. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, they have no legal obligation to do so.

(5) The article provides that States shall as necessary seek the assistance of any international organization in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words as necessary are intended to take account of a number of possibilities, including the following:

(6) First, assistance from international organizations may not be appropriate or necessary in every case involving the prevention or minimization of transboundary harm. For example, the State of origin or the affected State

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90/ Supra note 70, p. 268.

91/ See M. Virally, review Essay of E. Zoller, La Bonne Foi en Droit International Public, 1977, in Am. J. Int'l L., vol. 77, p. 130.

92/ See R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", Am. J. Int'l L., vol. 65, p. 734.

93/ International Law Reports, vol. 82, p. 614.

may, themselves, be technologically advanced and have as much or even more technical capability than international organizations to prevent or minimize significant transboundary harm. Obviously, in such cases, there is no obligation to seek assistance from international organizations.

(7) Second, the term "international organizations" is intended to refer to organizations that are relevant and in a position to assist in such matters. Even with the increasing number of international organizations, it cannot be assumed that there will necessarily be an international organization with the capabilities necessary for a particular instance.

(8) Third, even if there are relevant international organizations, their constitutions may bar them from responding to such requests from States. For example, some organizations may be required (or permitted) to respond to requests for assistance only from their member States, or they may labour under other constitutional impediments. Obviously, the article does not purport to create any obligation for international organizations to respond to requests for assistance under this article.

(9) Fourth, requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not discharge the obligation of individual States to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend on the nature of the request, the type of assistance involved, the place where the international organization would have to perform such assistance, etc.

(10) The latter part of the article speaks of minimizing the effects "both in affected States and in States of origin". It anticipates situations in which, due to an accident, there is, in addition to significant transboundary harm, massive harm in the State of origin itself. These words are, therefore, intended to present the idea that, in many ways, significant harm is likely to be a nuisance for all the States concerned, harming the State of origin as well as the other States. Hence, transboundary harm should, to the extent possible, be looked at as a problem requiring common endeavours and mutual cooperation to minimize its negative consequences. These words, of course, do not intend to impose any financial costs on the affected State for minimizing harm or clean-up operation in the State of origin.

Article 7

Implementation

States shall take the necessary legislative, administrative or other action to implement the provisions of the present articles.

Commentary

(1) This article states what might be thought to be the obvious, viz., that by virtue of becoming a party to the present articles, States would be required to take the necessary measures of implementation, whether of a legislative, administrative or other character. Article 7 has been included here both to emphasize the continuing character of the articles, which require action to be taken from time to time to prevent or minimize transboundary harm arising from activities to which the articles apply, as well as providing for liability in certain circumstances if significant transboundary harm should none the less occur. 94/

(2) To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with these draft articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration, or, in the case of disputes, for the relevant courts or tribunals, aided by the principle of non-discrimination contained in article 21.

Article 8

Relationship to other rules of international law

The fact that the present articles do not apply to transboundary harm arising from a wrongful act or omission of a State is without prejudice to the existence or operation of any other rule of international law relating to such an act or omission.

94/ This article is similar to paragraph 2 of article 2 of the Convention on Environmental Impact Assessment in a Transboundary Context, which reads: "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II." *Supra* note 40.

Commentary

(1) It has already been stressed that the present articles apply only to activities not prohibited by international law, whether such a prohibition arises in relation to the conduct of the activity or by reason of its prohibited effects. The present draft articles are residual in their operation. They apply only in situations where no more specific international rule or regime governs.

(2) Thus article 8 intends to make it as clear as may be that the present articles are without prejudice to the existence, operation or effect of any other rule of international law relating to an act or omission to which these articles might otherwise - i.e. in the absence of such a rule - be thought to apply. It follows that no inference is to be drawn from the fact that an activity falls within the apparent scope of these draft articles, as to the existence or non-existence of any other rule of international law, including any other primary rule operating within the realm of the law of State responsibility, as to the activity in question or its actual or potential transboundary effects. The reference in article 8 to any other rule of international law is intended to cover both treaty rules and rules of customary international law. It is equally intended to extend both to rules having a particular application - whether to a given region or a specified activity - and to rules which are universal or general in scope. The background character of the present articles is thus further emphasized.

CHAPTER II. PREVENTION

Article 9

Prior authorization

> States shall ensure that activities referred to in article 1 (a) are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1 (a).

Commentary

(1) This article imposes an obligation on States to *ensure* that activities which involve a risk of causing significant transboundary harm are not undertaken in their territory or otherwise under their jurisdiction or control without their prior authorization. The word "authorization" means granting permission by governmental authorities to conduct an activity covered by these

articles. States are free to choose the form of such authorization. The article serves as an introduction to the Chapter on prevention which is concerned with the implementation of the principle of prevention set out in article 4.

(2) It is the view of the Commission that the requirement of authorization obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and that the State should take the measures indicated in these articles. This article requires the State to take a responsible and active role in regulating activities taking place in their territory or under their jurisdiction or control with possible significant transboundary harm. The Commission notes, in this respect, that the Tribunal in the Trail Smelter arbitration held that Canada had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined". 95/ The Tribunal held that, in particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington" 96/ In the view of the Commission, article 9 is compatible with this requirement.

(3) The International Court of Justice in the Corfu Channel case held that a State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States". 97/ In the view of the Commission, the requirement of prior authorization creates the presumption that activities covered by these articles are taking place in the territory or otherwise under the jurisdiction or control of a State with the knowledge of that State.

(4) The words "in their territory or otherwise under their jurisdiction or control", are taken from article 2. The expression "activities referred to in article 1 (a)" introduces all the requirements of that article for an activity to fall within the scope of these articles.

(5) The second sentence of article 9 contemplates situations where a major change is proposed in the conduct of an activity that is otherwise innocuous, where the change would transform that activity into one which involves a risk

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95/ Supra note 10, pp. 1965-66.

96/ Ibid., p. 1966.

97/ Supra note 9, p. 22.

of causing significant transboundary harm. The implementation of such a change would also require State authorization. It is obvious that prior authorization is also required for a major change planned in an activity already within the scope of article 1 (a), and that change may increase the risk or alter the nature or the scope of the risk.

Article 10

Risk assessment

> Before taking a decision to authorize an activity referred to in article 1 (a), a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Commentary

(1) Under article 10, a State, before granting authorization to operators to undertake activities referred to in article 1 (a), should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take. The Commission feels that as these articles are designed to have global application, they cannot be too detailed. They should contain only what is necessary for clarity.

(2) Although the impact assessment in the *Trail Smelter* case may not directly relate to liability for risk, it however emphasized the importance of an assessment of the consequences of an activity causing significant risk. The Tribunal in that case indicated that the study undertaken by well-established and known scientists was "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke". 98/

(3) The requirement of article 10 is fully consonant with Principle 17 of the Rio Declaration on Environment and Development which provides also for impact assessment of activities that are likely to have a significant adverse impact on the environment:

98/ *Supra* note 10, p. 1973-74.

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." 99/

Requirement of assessment of adverse effects of activities have been incorporated in various forms in many international agreements. 100/ The most notable is the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 which is devoted entirely to the procedure to conduct and the substance of impact assessment. 101/

(4) The question of who should conduct the assessment is left to States. Such assessment is normally conducted by operators observing certain guidelines set by the States. These matters would have to be resolved by the States themselves through their domestic laws or applicable international

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99/ Supra, note 15.

100/ See, for example, articles 205 and 206 of the United Nations Convention on the Law of the Sea, supra note 20; article 4 of the Convention on the Regulation of Antarctic Mineral Resources Activities, supra note 40; article 8 of the Protocol on Environmental Protection to the Antarctic Treaty of 4 October 1991, International Legal Materials, vol. 30, p. 1461; article 14 (1) (a) and (b) of the United Nations Convention on Biological Diversity of 5 June 1992, doc. DPI/1307; article 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources of 9 July 1985, UNEP, Selected Multilateral Treaties in the Field of Environment, vol. 2, p. 343; Noumea Convention for the Protection of the Natural Resources and Environment of the South-Pacific Region of 24 November 1986, International Legal Materials, vol. 26, p. 38; article XI of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution of 24 April 1978, supra note 66; and the Jeddeh Regional Convention for the Conservation of the Regional Environment of the Red Sea and Gulf of Aden of 14 February 1982, UNEP, Selected Multilateral Treaties in the Field of the Environment, vol. 2, p. 144. In some treaties, the requirement of impact assessment is implied. For example, the two multilateral treaties regarding communication systems require their signatories to use their communications installations in ways that will not interfere with the facilities of other States parties. Article 10, paragraph 2, of the 1927 International Radiotelegraph Convention requires the parties to the Convention to operate stations in such a manner as not to interfere with the radioelectric communications of other contracting States or of persons authorized by those Governments. League of Nations, Treaty Series, vol. LXXXIV, p. 97. The 1936 International Convention concerning the Use of Broadcasting in the Cause of Peace prohibits the broadcasting to another State of material designed to incite the population to act in a manner incompatible with the internal order of security of that State. Ibid., vol. CLXXXVI, p. 301.

101/ For the text of the Convention, see document E/ECE/1250, reproduced in International Legal Materials, vol. 30, p. 800.

instruments. However, it is presumed that a State will designate an authority, whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(5) The article does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment. 102/

102/ Article 4 of the Convention provides that the environmental impact assessment of a State party should contain, as a minimum, the information described in Appendix II to the Convention. Appendix II lists nine items as follows:

Content of the Environmental Impact Assessment Documentation

Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4:

(a) A description of the proposed activity and its purpose;

(b) A description, where appropriate, of reasonable alternatives (for example, location or technological) to the proposed activity and also the no-action alternative;

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

General Assembly resolution 37/217 of 24 March 1983 on International Cooperation in the Field of the Environment also provides, in conclusion No. 8, in detail for the content of assessment for offshore mining and drilling. 103/

(6) The prevailing view in the Commission is to leave the specifics of what ought to be the content of assessment to the domestic laws of the State conducting such assessment. Such an assessment should contain, at least, an evaluation of the possible harmful impact of the activity concerned on persons or property as well as on the environment of other States. This requirement, which is contained in the second sentence of article 10, is intended to clarify further the reference, in the first sentence, to the assessment of "the risk of the activity causing significant transboundary harm". The Commission believes that the additional clarification is necessary for the simple reason that the State of origin will have to transmit the risk assessment to the States which might be suffering harm by that activity. In order for those States to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them as well as the probabilities of the harm occurring.

(7) The assessment shall include the effects of the activity not only on persons and property, but also on the environment of other States. The Commission is convinced of the necessity and the importance of the protection of the environment, independently of any harm to individual human beings or property.

(8) This article does not oblige the States to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. Activities involving a risk of causing significant transboundary harm have some general characteristics which are identifiable and could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing, the location of the activity and its proximity to the border area, etc. could all give an indication of whether the activity might fall within the scope of these articles. There are certain substances that are listed in some conventions as dangerous or hazardous and their use in any activity may in itself be an indication that those activities might cause

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103/ General Assembly Official Records: Thirty-seventh Session, Supp. No. 51 (A/37/51).

significant transboundary harm. 104/ There are also certain conventions that list the activities that are presumed to be harmful and that might signal that those activities might fall within the scope of these articles. 105/

Article 11

Pre-existing activities

> If a State, having assumed the obligations contained in these articles, ascertains that an activity referred to in article 1 (a) is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 9, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Commentary

(1) Article 11 is intended to apply in respect of activities within the scope of article 1 (a) which were being conducted in a State before that State

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104/ For example, the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources provides in article 4 an obligation for the Parties to eliminate or restrict the pollution of the environment by certain substances and the list of those substances is annexed to the Convention, UNEP, Selected Multilateral Treaties in the Field of the Environment, Ref. Series 3, 1983, p. 430. Similarly, the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area provides a list of hazardous substances in annex I and of noxious substances and materials in annex II, deposits of which are either prohibited or strictly limited, supra note 66; See also the Protocol to the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, ibid.; and the 1976 Convention for the Protection of the Rhine against Chemical Pollution, United Nations, Treaty Series, vol. 1124, p. 375.

105/ See for example annex I to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as the crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc. are identified as possibly dangerous to the environment and requiring environmental impact assessment under the Convention, supra note (101). Annex II of the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations of sites for the partial or complete disposal of solid, liquid wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc. have been identified as dangerous activities. This Convention also has a list of dangerous substances in annex I. Supra note 59.

assumed the obligations contained in these articles. The words "having assumed the obligations contained in these articles" are without prejudice to the final form of these articles.

(2) In accordance with this article, when the State "ascertains" that such an activity is being conducted in its territory or otherwise under its jurisdiction or control, when it assumes the obligations under these articles, it should "direct" those responsible for carrying out the activity to obtain the necessary authorization. The expression "necessary authorization" here means permits required under the domestic law of the State, in order to implement its obligations under these articles.

(3) The Commission is aware that it might be unreasonable to require States when they assume the obligations under these articles to apply them immediately in respect of existing activities. An immediate requirement of compliance could put a State in breach of the article, the moment it assumes the obligations under these articles. In addition, a State, at the moment it assumes the obligations under these articles, might not know of the existence of all such activities within its territory or under its jurisdiction or control. For that reason, the article provides that when a State "ascertains" the existence of such an activity, it should comply with the obligations. The word "ascertain" in this article should not, however, be interpreted so as to justify States merely to wait until such information is brought to their knowledge by other States or private entities. The word "ascertain" should be understood in the context of the obligation of due diligence, requiring reasonable and good faith efforts by the States to identify such activities.

(4) A certain period of time might be needed for the operator of the activity to comply with the authorization requirements. The Commission is of the view that the choice between whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization should be left to the State of origin. If the State chooses to allow the activity to continue, it does so at its own risk. It is the view of the Commission that absent any language in the article indicating possible repercussions, the State of origin will have no incentive to comply and to do so expeditiously with the requirements of these articles. Therefore, the expression "at its own risk" is intended: (a) to provide, in case harm were to occur, a link to the negotiations on the nature and extent

of compensation or other relief contemplated in Chapter III; and (b) to leave the possibility open for the application of any rule of international law on responsibility in such circumstances.

(5) Some members of the Commission favoured the deletion of the words "at its own risk". In their view, those words implied that the State of origin may be liable for any damage caused by such activities before authorization was granted. The reservation of these members extended also to the use of these words in article 17, paragraph 3. Other members of the Commission, however, favoured the retention of those words. In their view, those words did not imply that the State of origin was liable for any harm caused; it only kept the option of such a liability open, to be the subject of negotiations under Chapter III. They also felt that the deletion of those words would change the fair balance the article maintains between the interests of the State of origin and the States likely to be affected.

(6) In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity. If the State of origin fails to do so, it will be assumed that the activity is being conducted with the knowledge and the consent of the State of origin and, if harm occurs, this situation will be amongst the factors indicated in article 22 for negotiations on compensation or other relief, in particular subparagraph (a).

Article 12

Non-transference of risk

> In taking measures to prevent or minimize a risk of significant transboundary harm caused by an activity referred to in article 1 (a), States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Commentary

(1) This article states a general principle of non-transference of risk. It calls on States when taking measures to prevent or minimize a risk of causing significant transboundary harm to ensure that the risk is not "simply" transferred, directly or indirectly, from one area to another or transformed from one type of risk to another. This article is inspired by the new trend in environmental law, beginning with its endorsement by the Stockholm Conference on the Human Environment, to design comprehensive policy for protecting the environment. Principle 13 of the General Principles for

Assessment and Control of Marine Pollution suggested by the Intergovernmental Working Group on Marine Pollution and endorsed by the United Nations Conference on the Human Environment provides:

> "Action to prevent and control marine pollution (particularly direct prohibitions and specific release limits) must guard against the effect of simply transferring damage or hazard from one part of the environment to another." 106/

(2) This Principle was incorporated in article 195 of the United Nations Convention on the Law of the Sea which states:

> "In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another." 107/

Article II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters also provides for a similar principle:

> "In taking measures to control and regulate hazardous activities and substances, to prevent and control accidental pollution, to mitigate damage arising from accidental pollution, countries should do everything so as not to transfer, directly or indirectly, damage or risks between different environmental media or transform one type of pollution into another." 108/

(3) The Rio Declaration on Environment and Development discourages States, in Principle 14, from relocating and transferring to other States activities and substances harmful to the environment and human health. This Principle, even though primarily aimed at a different problem, is rather more limited than Principle 13 of the Principles for Assessment and Control of Marine Pollution, the Law of the Sea and the Code of Conduct mentioned earlier. Principle 14 reads:

> "States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health." 109/

106/ Supra note 11.

107/ Supra note 43.

108/ Supra note 37.

109/ Supra note 15.

(4) The expression "simply transferred ... or transformed" is concerned with precluding actions that purport to prevent or minimize but, in fact, merely externalize the risk by shifting it to a different sequence or activity without any meaningful reduction of said risk (see Principle 13 of the Principles for Assessment and Control of Marine Pollution endorsed by the Stockholm Conference). The Commission is aware that, in the context of this topic, the choice of an activity, the place in which it should be conducted and the use of measures to prevent or reduce risk of its transboundary harm are, in general, matters that have to be determined through the process of finding an equitable balance of interests of the parties concerned; obviously the requirement of this article should be understood in that context. It is, however, the view of the Commission that in the process of finding an equitable balance of interests, the parties should take into account the general principle provided for in the article.

(5) The word "transfer" means physical movement from one place to another. The word "transformed" is used in article 195 of the United Nations Convention on the Law of the Sea and refers to the quality or the nature of risk. The words "directly or indirectly" are used in article 195 of the Law of the Sea Convention and are intended to set a much higher degree of care for the States in complying with their obligations under this article.

Article 13

Notification and information

1. If the assessment referred to in article 10 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Commentary

(1) Article 13 deals with a situation in which the assessment undertaken by a State, in accordance with article 10, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 14, 15, 17 and 18, provides for a set of procedures essential to balancing the interests of all the States concerned by giving

them a reasonable opportunity to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 13 calls on a State to notify other States which are likely to be affected by the activity that is planned. The activities here include both those that are planned by the State itself and by private entities. The requirement of notification is an indispensable part of any system designed to prevent or minimize transboundary harm.

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the Corfu Channel case, where the International Court of Justice characterized the duty to warn as based on "elementary considerations of humanity". 110/ This principle is recognized in the context of the use of international watercourses and in that context is embodied in a number of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations. 111/

(4) In addition to the utilization of international watercourses, the principle of notification has also been recognized in respect of other activities with transboundary effects. For example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context 112/ and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents. 113/ Principle 19 of the Rio Declaration on Environment and Development speaks of timely notification:

> "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a

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110/ Supra note 9, p. 22.

111/ For treaties dealing with prior notification and exchange of information in respect of watercourses, see commentary to article 12 "Notification concerning planned measures with possible adverse effects" of the draft articles on The Law of the Non-Navigational Uses of International Watercourses, supra note 62.

112/ Article 3 of the Convention provides for an elaborate system of notification, supra note 101.

113/ International Legal Materials, vol. 31, p. 1333.

significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith." 114/

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, OECD resolution C(71)73 of 18 May 1971 stipulates that each member State is to receive notification prior to the proposed measures in each other member State regarding substances which have adverse impact on man or the environment where such measures could have significant effects on the economics and trade of the other States. 115/ OECD resolution C(74)224 on 14 November 1974 on the "Principles concerning transfrontier pollution" in its "Principle of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution. 116/

(6) The principle of notification is well established in the case of environmental emergencies. Principle 18 of the Rio Declaration on Environment and Development, 117/ article 198 of the United Nations Convention on the Law of the Sea, 118/ article 2 of the Convention on Early Notification of a Nuclear Accident, 119/ article 14 (1) (d) and (3) of the United Nations Convention on Biological Diversity, 120/ and article 5 (1) (c) of the International Convention on Oil Pollution Preparedness, Response and Cooperation 121/ all require notification.

(7) Where assessment reveals the risk of causing significant transboundary harm, in accordance with paragraph 1, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The

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114/ Supra note 15.

115/ OECD, OECD and the Environment, 1986, p. 89, para. 4, of the Annex.

116/ Ibid., p. 142.

117/ Supra note 15.

118/ Supra note 20.

119/ International Legal Materials, vol. 25, p. 1369.

120/ Supra note 100.

121/ International Legal Materials, vol. 30, p. 735.

notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of the activity in accordance with article 10. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called *raw* data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm.

(8) States are free to decide how they wish to inform the States that are likely to be affected. As a general rule, it is assumed that States will directly contact the other States through diplomatic channels. In the absence of diplomatic relations, States may give notification to the other States through a third State.

(9) *Paragraph 2* addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify *all* the States which may be affected prior to authorizing the activity and only after the activity is undertaken gains that knowledge. In accordance with this paragraph, the State of origin, in such cases, is under the obligation to make such notification *without delay*. The reference to *without delay* is intended to require that the State of origin should make notification as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine that certain other States are likely to be affected by the activity.

Article 14

Exchange of information

> While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Commentary

(1) Article 14 deals with steps to be taken *after* an activity has been undertaken. The purpose of all these steps is the same as previous articles, viz., to prevent or minimize the risk of causing significant transboundary harm.

(2) Article 14 requires the State of origin and the likely affected States to exchange information regarding the activity after it has been undertaken. In the view of the Commission, preventing and minimizing the risk of transboundary harm based on the concept of due diligence are not a once-and-for-all effort; they require continuing efforts. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 14, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States. 122/ In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as for example, competent international organizations.

122/ For example, article 10 of the Convention on the Protection of Marine Pollution from Land-based Sources, International Legal Materials, vol. 13, p. 352; article 4 of the Vienna Convention for the Protection of the Ozone Layer, ibid., vol. 26, p. 1529; and article 200 of the United Nations Convention on the Law of the Sea, supra note 20, speak of individual or joint research by the States parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-Range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the States parties, International Legal Materials, vol. 18, p. 1442. Examples are found in other conventions such as article VI, para. 1 (iii), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, supra note 37; article 17 of the United Nations Convention on Biological Diversity, supra note 100; and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, supra note 48.

(5) Article 14 requires that such information should be exchanged in a timely manner. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions.

(6) There is no requirement in the article as to the frequency of exchange of information. The requirement of article 14 comes into operation only when States have any information which is relevant to preventing or minimizing transboundary harm.

Article 15

Information to the public

> States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 (a) with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Commentary

(1) Article 15 requires States, whenever possible and by such means as are appropriate, to provide their own public with information relating to the risk and harm that might result from an activity subject to authorization and to ascertain their views thereon. The article therefore requires States (a) to provide information to their public regarding the activity and the risk and the harm it involves, and (b) to ascertain the views of the public. It is, of course, clear that the purpose of providing information to the public is in order to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated.

(2) The content of the information to be provided to the public includes information about the activity itself as well as the nature and the scope of risk and harm that it entails. Such information is contained in the documents accompanying the notification which is effected in accordance with article 13 or in the assessment which may be carried out by the State likely to be affected under article 18.

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular of seeking to involve, in the decision-making processes, individuals whose lives, health, property and

environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

(4) Principle 10 of the Rio Declaration on Environment and Development provides for public involvement in decision-making processes as follows:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." 123/

(5) A number of other recent international legal agreements dealing with environmental issues have required States to provide the public with information and to give it an opportunity to participate in decision-making processes. Article VII, paragraphs 1 and 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters is relevant in that context:

> "1. In order to promote informed decision-making by central, regional or local authorities in proceedings concerning accidental pollution of transboundary inland waters, countries should facilitate participation of the public likely to be affected in hearings and preliminary inquiries and the making of objections in respect of proposed decisions, as well as recourse to and standing in administrative and judicial proceedings.
>
> 2. Countries of incident should take all appropriate measures to provide physical and legal persons exposed to a significant risk of accidental pollution of transboundary inland waters with sufficient information to enable them to exercise the rights accorded to them by national law in accordance with the objectives of this Code." 124/

Article 16 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 125/ article 3, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary

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123/ *Supra* note 15.

124/ *Supra* note 37.

125/ *Supra* note 48.

Context, 126/ article 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 127/ and article 6 of the United Nations Framework Convention on Climate Change 128/ all provide for information to the public.

(6) There are many modalities for participation in decision-making processes. Reviewing data and information on the basis of which decisions will be based and having an opportunity to confirm or challenge the accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. In the view of the Commission, this form of public involvement enhances the efforts to prevent transboundary and environmental harm.

(7) The obligation contained in article 15 is circumscribed by the phrase "whenever possible and by such means as are appropriate". The words "whenever possible" are assigned here a normative rather than factual reference are intended to take into account possible constitutional and other domestic limitations where such right to hearings may not exist. The words "by such means as are appropriate" is intended to leave the ways which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies, local authorities, etc.

(8) Article 15 limits the obligation of each State to providing such information to its own public. The words "States shall ... provide their own public" does not obligate a State to provide information to the public of another State. For example, the State that might be affected, after receiving notification and information from the State of origin, shall, when possible and by such means as are appropriate, inform those parts of its own public likely to be affected before responding to the notification.

126/ Supra note 40.

127/ Supra note 66.

128/ International Legal Materials, vol. 31, p. 851.

Article 16

National security and industrial secrets

> Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Commentary

(1) Article 16 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 13, 14 and 15. In the view of the Commission, States should not be obligated to disclose information that is vital to their national security or is considered an industrial secret. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the draft articles on the Law of the Non-Navigational Uses of International Watercourses 129/ also provides for a similar exception to the requirement of disclosure of information.

(2) Article 16 includes industrial secrets in addition to national security. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected even under the domestic law. Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 130/ and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context 131/ provide for similar protection of industrial and commercial secrecy.

(3) Article 16 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be

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129/ *Supra* note 62.

130/ *Supra* note 48.

131/ *Supra* note 40.

affected. It, therefore, requires the State of origin that is withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as can be provided under the circumstances. The words "as much information as can be provided" include, for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words "under the circumstances" refer to the conditions invoked for withholding the information. Article 16 relies on the good faith cooperation of the parties.

Article 17

Consultations on preventive measures

> 1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.
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> 2. States shall seek solutions based on an equitable balance of interests in the light of article 19.
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> 3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Commentary

(1) Article 17 requires the States concerned, that is the State of origin and the States that are likely to be affected, to enter into consultations in order to agree on the measures to prevent or minimize the risk of causing significant transboundary harm. Depending upon the time at which article 17 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) The Commission has attempted to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking appropriate preventive measures. Therefore, the article provides neither a mere formality which the State of origin has to go through with no real intention of reaching a solution

acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good faith and must take into account each other's legitimate interests. The parties consult each other with a view to arriving at an acceptable solution regarding the measures to be adopted to prevent or minimize the risk of significant transboundary harm.

(3) It is the view of the Commission that the principle of good faith is an integral part of any requirement of consultations and negotiations. The obligation to consult and negotiate genuinely and in good faith was recognized in the Lake Lanoux award where the Tribunal stated that:

> "Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers." 132/

(4) With regard to this particular point about good faith, the Commission also relies on the judgement of the International Court of Justice in the Fisheries Jurisdiction (United Kingdom v. Iceland) case. There the Court stated that: "[t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other". 133/ The Commission also finds the decision of the Court in the North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands) 134/ on the manner in which negotiations should be conducted relevant to this article. In those cases the Court ruled as follows:

> "(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic

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132/ Supra note 27.

133/ Fisheries Jurisdiction (United Kingdom v. Iceland) case, Merits, Judgement of 25 July 1974, I.C.J. Reports 1974, para. 78.

134/ North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands), Judgement of 20 February 1969, I.C.J. Reports 1969, especially paras. 85 and 87.

> application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it." 135/

Even though the Court in this judgement speaks of "negotiations", the Commission believes that the good faith requirement in the conduct of the parties during the course of consultation or negotiations are the same.

(5) *Under paragraph 1*, the States concerned shall enter into consultations at the request of any of them. That is either the State of origin or any of the States likely to be affected. The parties shall enter into consultations *without delay*. The expression *without delay* is intended to avoid those situations where a State, upon being requested to enter into consultations, would make unreasonable excuses to delay consultations.

(6) The purpose of consultations is for the parties: (a) to find acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of significant transboundary harm; and (b) to cooperate in the implementation of those measures. The words "acceptable solutions", regarding the adoption of preventive measures, refers to those measures that are accepted by the parties within the guidelines specified in paragraph 2. Generally, the consent of the parties on measures of prevention will be expressed by means of some form of an agreement.

(7) The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm. Once those measures are selected, the parties are required, under the last clause of paragraph 1, to cooperate in their implementation. This requirement, again, stems from the view of the Commission that the obligation of due diligence, the core base of the provisions intended to prevent or minimize significant transboundary harm, is of a continuous nature affecting every stage related to the conduct of the activity.

(8) Article 17 may be invoked whenever there is a question about the need to take preventive measures. Such questions obviously may arise as a result of article 13, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing

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135/ Ibid., para. 85.

significant transboundary harm; or in the course of the exchange of information under article 14 or in the context of article 18 on the rights of the State likely to be affected.

(9) Article 17 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 13 or exchange information under article 14 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(10) Paragraph 2 provides guidance for States when consulting each other on preventive measures. The parties shall seek solutions based on an equitable balance of interests in light of article 19. Neither paragraph 2 of this article nor article 19 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(11) Paragraph 3 deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. As explained in paragraph (3) above, the article maintains a balance between the two considerations, one of which is to deny the States likely to be affected a right of veto. In this context, the Commission recalls the Lake Lanoux award where the Tribunal noted that, in certain situations, the party that was likely to be affected might, in violation of good faith, paralyse genuine negotiation efforts. 136/ To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in even a better position to seriously take them into account in carrying out the activity. In addition, the State of origin conducts the activity "at its own risk". This expression is also used in article 11 on "Pre-existing activities". The explanations given in paragraph (4) of the commentary to article 11 on this expression also apply here.

136/ Supra note 27, p. 128.

(12) The last part of paragraph 3 also protects the interests of States likely to be affected, by allowing them to pursue any rights that they might have under these articles or otherwise. The word "otherwise" is intended to have a broad scope so as to include such rights as the States likely to be affected have under any rule of international law, general principles of law, domestic law, etc.

Article 18

Rights of the State likely to be affected

> 1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 17.
>
> 2. The State requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1 (a), the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Commentary

(1) This article addresses the situation in which a State, although it has received no notification about an activity in accordance with article 13, becomes aware that an activity is being carried out in another State, either by the State itself or by a private entity, and believes that the activity carries a risk of causing it significant harm.

(2) This article is intended to protect the rights and the legitimate interests of States that have reason to believe that they are likely to be adversely affected by an activity. Article 18 enables them to request consultations and imposes a coordinate obligation on the State of origin to accede to the request. In the absence of article 18, the States likely to be affected cannot compel the State of origin to enter into consultations. Similar provisions have been provided for in other legal instruments. Article 18 of the draft articles on the Law of the Non-Navigational Uses of International Watercourses, 137/ and article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary

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137/ *Supra* note 62.

Context 138/ also contemplate a procedure by which a State likely to be affected by an activity can initiate consultations with the State of origin.

(3) Paragraph 1 allows a State which has serious reason to believe that the activity being conducted in the territory or otherwise under the jurisdiction or control of another State has created a risk of causing it significant harm to require consultations under article 17. The words serious reason are intended to preclude other States from creating unnecessary difficulties for the State of origin by requesting consultations on mere suspicion or conjecture. Of course, the State claiming that it has been exposed to a significant risk of transboundary harm will have a far stronger case when it can show that it has already suffered injury as the result of the activity.

(4) Once consultations have begun, the States concerned will either agree that the activity is one of those covered by article 1 (a), and the State of origin should therefore take preventive measures, or the parties will not agree and the State of origin will continue to believe that the activity is not within the scope of article 1 (a). In the former case, the parties must conduct their consultations in accordance with article 17 and find acceptable solutions based on an equitable balance of interests. In the latter case, namely where the parties disagree on the very nature of the activity, no further step is anticipated in the paragraph.

(5) This paragraph does not apply to situations in which the State of origin is still at the planning stage of the activity, for it is assumed that the State of origin may still notify the States likely to be affected. However, if such notification is not effected, the States likely to be affected may require consultations as soon as the activity begins. Consultation may also be requested at the very early stages of the activity such as, for example, the stage of construction.

(6) Paragraph 2, in its first sentence, attempts to strike a fair balance between the interests of the State of origin that has been required to enter into consultations and the interests of the State which believes it has been affected or that it is likely to be affected by requiring the latter State to provide justification for such a belief and support it with documents containing its own technical assessment of the alleged risk. The State requesting consultations must, as mentioned above, have a "serious reason" for believing that there is a risk and it is likely to suffer harm from it.

138/ Supra note 40.

Taking into account that that State has not received any information from the State of origin regarding the activity and therefore may not have access to all the relevant technical data, the supporting documents and the assessment required of it need not be complete, but should be sufficient to provide a reasonable ground for its assertions. The expression "serious reason" should be interpreted in that context.

(7) The second sentence of paragraph 2 deals with financial consequences, if it is proved that the activity in question is within the scope of article 1 (a). In such cases, the State of origin may be requested to pay an equitable share of the cost of the technical assessment. It is the view of the Commission that such a sharing of the assessment cost is reasonable for the following reasons: (1) the State of origin would have had, in any case, to make such an assessment in accordance with article 10; (2) it would be unfair to expect that the cost of the assessment should be borne by the State that is likely to be injured by an activity in another State and from which it receives no benefit; and (3) if the State of origin is not obliged to share the cost of assessment undertaken by the State likely to be affected, that might serve to encourage the State of origin not to make the impact assessment it should itself have made in accordance with article 10, thereby externalizing the costs by leaving the assessment to be carried out by those States likely to be affected.

(8) The Commission, however, also envisages situations in which the reasons for the absence of notification by the State of origin might be completely innocent. The State of origin might have honestly believed that the activity posed no risk of causing significant transboundary harm. For that reason the State likely to be affected may claim "an equitable share of the cost of the assessment". These words mean that if, following discussion, it appears that the assessment does not manifest a risk of significant harm, the matter is at an end and obviously the question of sharing the cost does not even arise. But if such a risk is revealed, then it is reasonable that the State of origin should be required to contribute an equitable share of the cost of the assessment. This may not be the whole cost for, in any event, the State likely to be affected would have undertaken some assessment of its own. The share of the State of origin would be restricted to that part of the cost which resulted directly from that State's failure to effect a notification in accordance with article 13 and to provide technical information.

Article 19

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 17, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Commentary

(1) The purpose of this article is to provide some guidance for States which are engaged in consultations seeking to achieve an equitable balance of interests. In reaching an equitable balance of interests, the facts have to be established and all the relevant factors and circumstances weighed.

(2) The main clause of the article provides that in order "to achieve an equitable balance of interests as referred to in paragraph 2 of article 17, the States concerned shall take into account all relevant factors and circumstances". The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. Some of the factors may be relevant in a particular case, while others may not, and still

other factors not contained in the list may prove relevant. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general, the factors and circumstances indicated will allow the parties to compare the costs and benefits which may be involved in a particular case.

(3) Subparagraph (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing or minimizing such risk and the possibility of repairing the harm. For example, the degree of risk of harm may be high, but there may be measures that can prevent or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) Subparagraph (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected. The Commission, in this context recalls the decision in the Donauversinkung case where the court stated that:

> "The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other." 139/

(5) Subparagraph (c) compares, in the same fashion as subparagraph (a), the risk of significant harm to the environment and the availability of means of preventing or minimizing such a risk and the possibility of restoring the environment. The Commission emphasizes the particular importance of protection of the environment. The Commission considers Principle 15 of the Rio Declaration relevant to this subparagraph where it states: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." 140/

139/ Wurttemberg and Prussia v. Baden (Donauversinkung case) (1927) in Entscheidungen des Reichsgerichts in Zivilsachen (Berlin, de Gruyter), vol. 116, Appendix, pp. 18-45 (1927), in Annual Digest of Public International Law Cases, (1927-1928) (London, 1931), p. 131; see also Kansas v. Colorado (1907) 206 US 100, and Washington v. Oregon (1936) 297 US 517.

140/ Supra note 15.

(6) The Commission is aware that the concept of transboundary harm as used in subparagraph (a) might be broadly interpreted and could include harm to the environment. But the Commission makes a distinction, for the purpose of this article, between harm to some part of the environment which could be translated into value deprivation to individuals, and be measurable by standard economic means, on the one hand, and harm to the environment not susceptible to such measurement, on the other. The former is intended to be covered by subparagraph (a) and the latter to be covered by this paragraph.

(7) Subparagraph (d) introduces a number of factors that must be compared and taken into account. The economic viability of the activity must be compared to the costs of prevention demanded by the States likely to be affected. The cost of the preventive measures should not be so high as to make the activity economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the location, or conducting it by other means, or replacing it with an alternative activity. The words "conducting [the activity] by other means" intends to take into account, for example, a situation in which one type of chemical substance used in the activity, which might be the source of transboundary harm, could be replaced by another chemical substance; or mechanical equipment in the plant or the factory could be replaced by different equipment. The words "replacing [the activity] with alternative activity" is intended to take account of the possibility that the same or comparable results may be reached by another activity with no risk, or much lower risk, of significant transboundary harm.

(8) Subparagraph (e) provides that one of the elements determining the choice of preventive measures is the willingness of the States likely to be affected to contribute to the cost of prevention. For example, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable, taking into account other factors, to expect the State of origin to take more costly but more effective preventive measures.

(9) Subparagraph (f) compares the standard of prevention demanded of the State of origin to that applied to the same or comparable activity in the State likely to be affected. The rationale is that, in general, it might be unreasonable to demand that the State of origin comply with a much higher standard of prevention than would be operative in the States likely to be affected. This factor, however, is not in itself conclusive. There may be situations in which the State of origin would be expected to apply standards of prevention to the activity that are higher than those applied in the States

likely to be affected, i.e., where the State of origin is a highly developed State and applies domestically established environmental law regulations. These regulations may be substantially higher than those applied in a State of origin which because of its stage of development may have (and, indeed, have need of) few if any regulations on the standards of prevention. Taking into account other factors, the State of origin may have to apply its own standards of prevention which are higher than those of the States likely to be affected.

(10) States should also take into account the standards of prevention applied to the same or comparable activities in other regions or, if there are such, the international standards of prevention applicable for similar activities. This is particularly relevant when, for example, the States concerned do not have any standard of prevention for such activities, or they wish to improve their existing standards.

CHAPTER III. COMPENSATION OR OTHER RELIEF

General commentary

(1) As explained in the commentary to article 5, the articles on this topic do not follow the principle of "strict" or "absolute" liability as commonly known. They recognize that while these concepts are familiar and developed in the domestic law in many States and in relation to certain activities in international law, they have not yet been fully developed in international law, in respect to a larger group of activities such as those covered by article 1. 141/ As in domestic law, the principle of justice and fairness as well as other social policies indicate that those who have suffered harm because of the activities of others should be compensated. (See also commentary to article 5 of Chapter I). Thus Chapter III provides two procedures through which injured parties may seek remedies: pursuing claims in the courts of the State of origin, or through negotiations between the State of origin and the affected State or States. These two procedures are, of course, without prejudice to any other arrangements on which the parties may have agreed, or to the due exercise of the jurisdiction of the courts of

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141/ For the development of the concept of "strict or absolute liability" in torts in domestic law and also in international law, see "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", prepared by the Secretariat, document A/CN.4/471, 1995, paras. 16-60.

the States where the injury occurred. The latter jurisdiction may exist in accordance with applicable principles of private international law: if it exists, it is not affected by the present articles.

(2) When relief is sought through the courts of the State of origin, it is in accordance with the applicable law of that State. If a remedy is sought through negotiations, article 22 sets out a number of factors which should guide the parties to reach an amicable settlement.

(3) The specification of the nature and the extent of compensation obviously rests on an initial determination that significant transboundary harm from an activity referred to in article 1 has occurred. Such a factual determination will be effected by national courts when the injured parties bring their complaints to them and by the States themselves when negotiations have been chosen as the mode for securing remedies.

(4) In these instances of State practice in which, when compensation for significant transboundary harm arising from the types of activities referred to in article 1 has been paid, it has taken a variety of forms either payment of a lump sum to the injured State, so that it may settle individual claims (normally through the application of national law), or payment directly to individual claimants. The forms of compensation prevailing in relations between States are, on the whole, similar to those existing in national law. Indeed, some conventions provide that national legislation is to govern the question of compensation. When damages are monetary, States have generally sought to select readily convertible currencies. 142/

(5) Article 7 of Chapter I on the implementation of these articles, which requires States to take legislative, administrative or other action to implement the provisions of the present articles should be interpreted, in relation to Chapter III, as including an obligation to provide victims of transboundary harm of activities conducted in their territory or otherwise under their jurisdiction or control with substantive and procedural rights to remedies.

Article 20

Non-discrimination

> 1. A State on the territory of which an activity referred to in article 1 is carried out shall not discriminate on the basis of nationality, residence or place of injury in granting to persons who have

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142/ See ibid., paras. 272-280.

suffered significant transboundary harm, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief.

2. Paragraph 1 is without prejudice to any agreement between the States concerned providing for special arrangements for the protection of the interests of persons who have suffered significant transboundary harm.

Commentary

(1) This article sets out the basic principle that the State of origin is to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the damage occurred.

(2) Paragraph 1 contains two basic elements, namely, non-discrimination on the basis of nationality or residence and non-discrimination on the basis of where the harm occurred. The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who has suffered significant transboundary harm as a result of activities referred to in article 1 should, regardless of where the harm occurred or might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of domestic harm. This obligation does not intend to affect the existing practice in some States of requiring that non-residents or aliens post a bond, as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with its legal system".

(3) Paragraph 1 also provides that the State of origin may not discriminate on the basis of the place where the damage occurred. In other words, if significant harm is caused in State A as a result of an activity referred to in article 1 in State B, State B may not bar an action on the grounds that the harm occurred outside its jurisdiction.

(4) Paragraph 2 indicates that the rule is residual. Accordingly, States concerned may agree on the best means of providing relief to persons who have suffered significant harm, for example through a bilateral agreement. Chapter II of the articles encourages the States concerned to agree on a special regime dealing with activities with the risk of significant transboundary harm. In such arrangements, States may also provide for ways and means of protecting the interests of the persons concerned in case of significant transboundary harm. The phrase "for the protection of the interests of persons who have suffered" has been used to make it clear that

the paragraph is not intended to suggest that States can decide by mutual agreement to discriminate in granting access to their judicial or other procedures or a right to compensation. The purpose of the inter-State agreement should always be the protection of the interests of the victims of the harm.

(5) Precedents for the obligation contained in this article may be found in international agreements and in recommendations of international organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 provides as follows:

> "Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court of the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.
>
> The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out." 143/

The Council of the Organization of Economic Cooperation and Development (OECD) has adopted a Recommendation on Implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4 (a) of that Recommendation provides as follows:

> "Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of

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143/ Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974, art. 3, United Nations, Treaty Series, vol. 1092, p. 279, reprinted in International Legal Materials, vol. XIII, 1974, p. 591. Similar provisions may be found in article 2, paragraph 6 of the ECE Convention on environmental impact assessment in a transboundary context, of 25 February 1991, document E/ECE/1250; the Guidelines on responsibility and liability regarding transboundary water pollution, part II.B.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution, document ENVWA/R.45, 20 November 1990; and the Draft ECE Charter on environmental rights and obligations, paragraph 6, prepared at a meeting of experts on environmental law, 25 February-1 March 1991, document ENVWA/R.38, annex I.

> transfrontier pollution, shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status... ." 144/

Article 21

Nature and extent of compensation or other relief

> The State of origin and the affected State shall negotiate at the request of either party on the nature and extent of compensation or other relief for significant transboundary harm caused by an activity referred to in article 1, having regard to the factors set out in article 22 and in accordance with the principle that the victim of harm should not be left to bear the entire loss.

Commentary

(1) In addition to access to courts of the State of origin under article 20, article 21 provides for another procedure through which the nature and the extent of compensation could be determined: negotiation between the affected State and the State of origin. The article does not suggest that this procedure is necessarily to be preferred over resort to national courts. It merely recognizes that there may be circumstances in which negotiation may prove to be either the only way to obtain compensation or relief, or that, taking into account the circumstances of a particular situation, the more diplomatically appropriate one. For example, in a particular incident of transboundary harm, the affected State itself, apart from its citizens or residents, may have suffered significant harm and the States concerned may prefer to settle the matter through negotiations. There may also be situations in which it would be impractical or impossible for the injured citizens or residents of the injured State to lodge complaints in the courts of the State of origin, either because of the large number of injured persons, the procedural obstacles or because of the distance between the State of origin and the affected State, or the lack of economic means for the injured

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144/ OECD document C(77)28 (Final), annex, in OECD, OECD and the Environment, 1986, p. 150. To the same effect is principle 14 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, approved in decision 6/14 of the Governing Council of the United Nations Environment Programme (UNEP) of 19 May 1978. A discussion of the principle of equal access may be found in Van Hoogstraten, Environmental Policy and Law, vol. 2, 1976, 77.

persons to pursue claims in the courts of the State of origin, or the absence of any remedies in the substantive law of the State of the origin.

(2) The intention of the article is, however, to allow injured persons to undertake suits in the courts of the State of origin, and, while that procedure is pending, not to seek negotiations on those claims. At the same time, if the States concerned decide to settle the matter through negotiations, lodging complaints in the courts of the State of origin should be postponed pending the outcome of negotiations. Of course, such negotiations should provide effective remedies for the individual injured parties. The article does not intend to apply to negotiations where States, due to other bilateral arrangements, deprive, by mutual consent, injured parties from effective remedies.

(3) The article sets out two criteria on the basis on which the nature and the extent of compensation or other relief should be determined. First, in the light of a set of factors listed in article 22. Second, the principles that anyone who engages in an activity of the nature referred to in paragraph (a) of article 1 assumes the risk of adverse consequences as well as the benefit of the activity and, with regard to activities referred to in paragraph (b) of the article 1 "the victim of harm should not be left to bear the entire loss". This second criterion rests on a fundamental notion of humanity that individuals who have suffered harm or injury due to the activities of others should be granted relief. It finds deep resonance in the modern principles of human rights.

(4) The principle that the victim of harm should not be left to bear the entire loss, implies that compensation or other relief may not always be full. There may be circumstances in which the victim of significant transboundary harm may have to bear some loss. The criteria in article 22 are to guide the negotiating parties when they deal with that issue.

(5) The words "nature and the extent of compensation or other relief" are intended to indicate that remedies for transboundary harm may take forms other than compensation. In State practice, in addition to monetary compensation, compensation has occasionally taken the form of removing the danger or effecting a restitutio in integrum. In some circumstances, the remedy of a significant transboundary harm may be the restoration of the environment. That was the case, for example, in the Palomares incident, in 1966, when nuclear bombs dropped on Spanish territory and near the coasts of Spain, following a collision between a United States nuclear bomber and a supply

plane. The United States removed the causes of danger from Spain by retrieving the bombs and by removing the contaminated Spanish soil and burying it in its own territory. 145/ A clean-up operation is not restitution, but the intention and the policy behind it may make it remedial.

(6) Negotiations may be triggered at the request of either State of origin or the affected State. The article, however, does not intend to bar negotiation between the State of origin and private injured parties or negotiations between the injured parties and the operator of the activity causing the significant transboundary harm.

(7) It is the general principle of law that negotiation should be in "good faith". See commentary to article 6, paragraphs (2) and (3).

(8) Some members of the Working Group felt that injured private parties should be given the choice of which of the two procedures to follow. In their view, in some circumstances, negotiation may not provide as favourable remedy as the courts of the State of origin would have produced, since a number of other bilateral issues between the two negotiating States may affect their view on this particular matter.

Article 22

Factors for negotiations

In the negotiations referred to in article 21, the States concerned shall take into account inter alia the following factors:

(a) in the case of activities refereed to in article 1 (a), the extent to which the State of origin has complied with its obligations of prevention referred to in Chapter II;

(b) in the case of activities referred to in article 1 (a), the extent to which the State of origin has exercised due diligence in preventing or minimizing the damage;

(c) the extent to which the State of origin knew or had means of knowing that an activity referred to in article 1 was being or was about to be carried out in its territory or otherwise under its jurisdiction or control;

(d) the extent to which the State of origin benefits from the activity;

145/ The New York Times, 12 April 1966, p. 28, col.3. Also following the nuclear tests conducted in the Marshall Islands, the United States reportedly spent nearly $110 million to clear up several of the islands of the Eniwetok Atoll so that they could again become habitable. See International Herald Tribune, 15 June, 1982, p. 5, col. 2.

(e) the extent to which the affected State shares in the benefit of the activity;

(f) the extent to which assistance to either State is available from or has been provided by third States or international organizations;

(g) the extent to which compensation is reasonably available to or has been provided to injured persons, whether through proceedings in the courts of the State of origin or otherwise;

(h) the extent to which the law of the injured State provides for compensation or other relief for the same harm;

(i) the standards of protection applied in relation to a comparable activity by the affected State and in regional and international practice;

(j) the extent to which the State of origin has taken measures to assist the affected State in minimizing harm.

Commentary

(1) The purpose of the article is to provide guidance for the States negotiating the nature and the extent of compensation or other relief. In reaching a fair and equitable result, all relevant factors and circumstances must be weighed. The words "inter alia" are to indicate that the article does not purport to present an exhaustive list of factors.

(2) Subparagraph (a) links the relationship between Chapter II and the issue of liability for compensation, on the one hand, and the nature and extent of such compensation or other relief, on the other. It makes clear that while the obligations of prevention stipulated in Chapter II in relation to activities involving a risk of significant transboundary harm are not intended to be considered so-to-speak, hard obligations, that is their non-fulfilment would not entail State responsibility, it would certainly affect the extent of liability for compensation and the amount of such compensation or other relief. Flagrant lack of care and concern for the safety and interest of other States is contrary to the principle of good neighbourly relations. Exposing other States to risk would be an important factor in creating the expectation of who should bear liability for compensation and to what extent. If it becomes evident that had the State of origin complied with the standards for preventive measures in Chapter II, significant transboundary harm would not have occurred or, at least, not to the extent that it did, that finding could affect the extent of liability and the amount of compensation, not to speak of the conclusion that the State of origin should also provide

compensation. If, however, non-compliance by the State of origin of the preventive measures proves to have had no effect on the occurrence of transboundary harm or the extent of such harm, then this factor may be irrelevant. This situation is analogous to that provided for in paragraph 2 (c) of article 45 of the draft articles on "State responsibility" which states that in order to provide full reparation, the injured State may be entitled to obtain from the wrongdoing State satisfaction which may include "in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement".

(3) Subparagraph (b) provides that account should be taken of the extent to which the State of origin has exercised due diligence to prevent or minimize the damage. This factor is one other element which determines the good faith of the State of origin in exercising good neighbourliness and due diligence by demonstrating concern for the interests of other States which were negatively affected by the transboundary harm. The influence of this factor increases when the State of origin has taken such additional measures, after having already complied with the preventive measures of Chapter II.

(4) Subparagraph (c) sets out an important factor of notice - that is the State of origin knew or had means of knowing that an activity referred to in article 1 was being carried out in its territory, yet took no action. This factor is relevant, obviously, when the State of origin has failed to comply with the preventive measures of Chapter II and raises, as a defence, its lack of knowledge of the activity.

(5) Clearly, a State can comply with preventive measures only when it is aware of the activities that are being conducted in its territory or otherwise under its jurisdiction or control. A State is not expected to take preventive measures in respect of a clandestine activity in its territory for which it had no means of knowing, despite all reasonable exercise of due diligence.

(6) This factor is drawn from the dictum of the International Court of Justice in the Corfu Channel Case (Merits), where the Court found that it was the obligation of Albania to notify the existence of mines in its territorial waters, not only by virtue of Hague Convention No. VIII of 1907, but also of "certain general and well recognized principles, namely: elementary considerations of humanity, even more enacting in peace than in war, ... and every State's obligation not to allow knowingly its territory to be used for

acts contrary to the rights of other States." 146/ A failure by the State of origin to prove that it had no knowledge of the activity or had no means of knowing that such activity was being conducted in its territory, or otherwise under its jurisdiction or control, is a proof of its failure to exercise due diligence as set out in subparagraphs (a) and (b). 147/

(7) Subparagraph (d) and subparagraph (e) point to the extent to which the State of origin and the affected State are expected to share the burden for providing compensation and relief based on the benefit they themselves receive from the activity causing transboundary harm.

(8) Subparagraph (e) refers back to one of the elements justifying liability for compensation in case of significant transboundary harm, namely States should not externalize the cost of their progress and development by exposing other States to the risk of activities for which they alone are the direct beneficiaries. If the affected State is also a beneficiary of the activity which has caused the significant transboundary harm, taking into account other factors, particularly those involving due diligence, the affected State may be expected to share some of the costs as well. This factor is not intended to affect negatively the extent of compensation or other relief of injured private parties.

(9) Subparagraph (f) brings into play two elements: assistance available to the State of origin either by a third State or an international organization; and assistance available to the affected State by a third State or an international organization. As regards the former, if assistance to prevent or minimize significant transboundary harm was offered by a third State or was available through an international organization and the State of origin, simply through neglect or lack of concern for the interests of the affected State, did not take up on those opportunities, it is an indication of its failure to exercise due diligence. Regarding the latter, the affected State is also expected to be vigilant in minimizing harm to itself, even when caused by an activity outside its territory. Therefore, when opportunities to mitigate damages are available to the affected State by an offer from a third

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146/ See I.C.J. Reports, 1949, p. 22.

147/ In the Corfu Channel case, the International Court of Justice found that no attempt had been made by Albania to prevent the disaster and it therefore held Albania "responsible under international law for the explosion ... and for the damage and loss of human life ...". See ibid., p. 36.

State or are available through an international organization and the affected State does not take advantage of such opportunities, it too fails to meet the due diligence standards. If, on the other hand, the affected State receives such assistance, the extent of such assistance could be relevant in the determination of the extent and the amount of compensation or other relief.

(10) Subparagraph (g) takes into account two possibilities: first, negotiations may take place before the private injured parties pursue claims in the courts of the State of origin or through negotiation with the operator of the activity that caused the transboundary harm; or such negotiations may take place during or after such procedures have been completed. In either case, this factor is relevant in determining whether the injured parties have been or will be given fair compensation or other relief.

(11) Subparagraph (h) points to one of the elements in determining the validity of the expectations of the parties involved in transboundary harm with respect to compensation and other relief. The extent to which the law of the affected State provides compensation for certain specific types of harm is relevant in assessing the validity of expectation of compensation for a particular harm. If an injured person in the affected State would have had no possible action under the law of the affected State, one cannot conclude that the affected State views such harm as non-compensable. A contextual examination of the law is required in order to determine whether other Government procedures provide a functional equivalent. The point is that harm should be compensated. It should not lead to "windfalls". On the other hand, the law of the affected State may also provide compensation for a much larger category of harm and or at a level substantially higher than that provided for in the law of the State of origin. These comparative issues should be taken into account in negotiation between States.

(12) Subparagraph (i) also points to the shared expectation of the parties involved in a significant transboundary harm as well as to the exercise of due diligence and good neighbourliness. If, notwithstanding the preventive measures of Chapter II, the standard of protection applied in the conduct of the same or similar activities in the injured State was substantially less than that applied by the State of origin in respect of the activity causing the transboundary harm, it would not be persuasive if the affected State were to complain that the State of origin did not meet appropriate standard of due diligence. Similarly, if the State of origin can demonstrate that its

standards of protection are comparable with those at the regional or international level, it would have a better defence to accusations of breach of due diligence.

(13) Subparagraph (i) is relevant in determining the extent to which the State of origin exercised due diligence and good neighbourliness. In certain circumstances the State of origin might be in a better position to assist the affected State to mitigate harm due to its knowledge of the source and the cause of transboundary harm. Such assistance, therefore, should be encouraged, since the primary objective is to prevent or minimize harm. 148/

148/ For example, in 1972, in the Cherry Point incident, the World Bond, a tanker registered in Liberia, leaked 12,000 gallons of crude oil into the sea while unloading at the refinery of the Atlantic Richfied Corporation, at Cherry Point, in the State of Washington. The oil spread to Canadian waters and befouled five miles of beaches in British Columbia. Prompt action was taken both by the refinery and by the authorities on either side of the frontier to contain and limit the damage, so that injury to Canadian waters and shorelines could be minimized. See The Canadian Yearbook of International Law, 1973, vol. XI, pp. 333-334.

ANNEX II

REPORT ON THE LONG TERM PROGRAMME OF WORK

1. During its almost 50 years of existence, the Commission has undertaken and completed numerous topics belonging to various fields of public international law. [1] However, if one sets work completed either against international law in its generality or even against the list of topics raised at one time or another as possible topics for codification and progressive development of international law by the Commission [2] it is clear that much remains to be done.

2. The present paper does not purport to offer a complete survey of possible topics (in particular, the suggestions for "possible future topics" reflect proposals at different times by some of its members). Indeed, some topics proposed in the paper have been taken up by other bodies. The report as a whole aims at:

(a) Classifying some very general fields of public international law governed mainly by rules of customary international law;

(b) Enumerating, under each of these very general headings, various topics which, at some time or another, have been proposed by the Commission or by individual members as possible topics for the ILC (dates of initial proposal are shown below in square brackets);

(c) Adding some possible topics on which the Commission does not intend to take a firm position on their feasibility for future work;

(d) Indicating those which have already been completed in whole or in part; and

(e) Setting out a very general outline of the main legal problems raised by three of the possible future topics which, in the view of the Commission are appropriate for codification and progressive development. These topics are the following:

- (i) Diplomatic protection (Addendum 1);
- (ii) Ownership and protection of wrecks beyond the limits of national maritime jurisdiction (Addendum 2);
- (iii) Unilateral acts of States (Addendum 3).

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[1] See General scheme below, for details.

[2] Ibid.

These three topics have been indicated in bold-faced letters in the general scheme below.

3. The general scheme proposed below is an example of a general approach which, in the view of the Commission offers a way of integrating in a global review of the main fields of general public international law some possible topics for future studies. The Commission is fully aware of the fact that some of the topics mentioned fall within the scope of activities of other bodies; they are referred to for the purpose of illustrating the scope of international law. The Commission has no intention of overlapping with the competence of the institutions concerned.

4. If this approach seems fruitful to the Commission and to the Sixth Committee, it is suggested that further study could be made during the next session of the Commission of topics additional to those suggested in Addenda 1 to 3.

GENERAL SCHEME 3/

I. SOURCES OF INTERNATIONAL LAW

1. Topics already completed:
    - (a) Law of treaties:
        - (i) Vienna Convention on the law of treaties, 1969;
        - (ii) Vienna Convention on the law of treaties between States and international organizations or between two or more international organizations, 1986;
        - (iii) Draft articles on most-favoured nation clauses, 1978.
2. Topics under consideration by the Commission:
    Reservations to treaties.
3. Possible future topics:
    - (a) Law of treaties:
        Multilateral treaty-making process [1979];
    - (b) Law of unilateral acts [1971]:
        - (i) **Unilateral acts of States** (see general outline - **Addendum 3**);
        - (ii) Law applicable to resolutions of international organizations;
        - (iii) Control of validity of the resolutions of international organizations;

3/ This list is for illustrative purposes; neither the formulations nor the content commit the Commission in its future undertakings.

(c) Customary international law:

  (i) Formation of customary rules;

  (ii) Legal effects of customary rules;

(d) Jus cogens (and related concepts) [1992];

(e) Non-binding instruments.

II. SUBJECTS OF INTERNATIONAL LAW

1. Topics taken up but abandoned:

  (i) Fundamental rights and duties of States [1949];

  (ii) "Succession" of Governments [1949];

2. Possible future topics:

  (a) Subjects of international law [1949];

  (b) Statehood:

    (i) Position of States in international law [1971];

    (ii) Criteria for recognition [1949];

    (iii) Independence and sovereignty of States [1962];

  (c) Government:

    (i) Recognition of Governments [1949];

    (ii) Representative Governments.

III. SUCCESSION OF STATES AND OTHER LEGAL PERSONS

1. Topics already completed:

(a) Vienna Convention on State succession with respect to treaties, 1978;

(b) Vienna Convention on State succession with respect to State property, archives and debts, 1986.

2. Topics under consideration by the Commission:

Succession of States with respect to nationality.

3. Possible future topics:

(a) Succession of States in respect of membership of, and obligations towards, international organizations;

(b) "Acquired rights" in relation with State succession;

(c) Succession of international organizations.

IV. STATE JURISDICTION/IMMUNITY FROM JURISDICTION

1. Topics already completed:

   Jurisdictional immunities of States and their property, 1991.

2. Possible future topics:

   (a) Immunities from execution;

   (b) Extraterritorial jurisdiction:

      (i) Recognition of acts of foreign States [1949];

      (ii) Jurisdiction over foreign States [1949];

      (iii) Jurisdiction with respect to crimes committed outside national territory [1949];

      (iv) Extraterritorial application of national legislation [1992];

   (c) Territorial jurisdiction:

   Territorial domain of States [1949];

   (d) Jurisdiction relating to public services ("compétences relatives aux services publics").

V. LAW OF INTERNATIONAL ORGANIZATIONS

1. Topics already completed:

   Vienna Convention on the representation of States in their relations with international organizations of a universal character, 1975.

2. Topics taken up but not continued:

   Status, privileges and immunities of international organizations, their officials, experts, etc.

3. Possible future topics:

   (a) General principles of law of the international civil service;

   (b) International legal personality of international organizations;

   (c) Jurisdiction of international organizations:

      (i) Implied powers;

      (ii) Personal jurisdiction;

      (iii) Territorial jurisdiction.

VI. POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW

1. Topics already completed:

   Convention on the Reduction of Statelessness, 1961.

2. Possible future topics:

   (a) International law relating to individuals [1971]:

   The individual in international law;

(b) Treatment of aliens [1949]:

  (i) Right of asylum [1949];

  (ii) Extradition [1949];

(c) Law concerning international migrations [1992];

(d) Human rights and defence of democracy [1962].

VII. INTERNATIONAL CRIMINAL LAW

1. Topics already completed:

(a) Draft statute for an international criminal court, 1994;

(b) Code of crimes against the peace and security of mankind, 1996.

2. Possible future topics:

(a) The principle "Aut dedere aut judicare";

(b) International crimes other than those referred to in the Code of Crimes against the peace and security of mankind.

VIII. LAW OF INTERNATIONAL SPACES

1. Topics already completed:

(a) Law of the sea:
Four Geneva Conventions, 1958.

(b) Legal regime of international rivers:
Draft articles on the Law of non-navigational uses of international watercourses, 1994.

2. Topics taken up and abandoned:

Juridical regime of historical waters, 1962.

3. Possible future topics:

(a) Law of the sea:
Ownership and protection of wrecks beyond the limits of national maritime jurisdiction (see general outline - **Addendum 2**);

(b) Legal regime of international rivers and related topics:
Navigation on international rivers;

(c) Law of the air [1971];

(d) Law of space [1962];

(e) Shared natural resources:

  (i) Global commons [1992];

  (ii) The common heritage of mankind;

  (iii) Transboundary resources;

(iv) The law of continued international groundwaters;

(v) Common interest of mankind.

IX. LAW OF INTERNATIONAL RELATIONS/RESPONSIBILITY

1. Topics already completed:

(a) Diplomatic and consular relations:

(i) Vienna Convention on diplomatic relations, 1961;

(ii) Vienna Convention on consular relations, 1963;

(iii) Vienna Convention on special missions, 1969;

(iv) Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, 1973;

(v) Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, 1989.

2. Topics under consideration by the Commission:

(a) State responsibility;

(b) International liability for injurious consequences of acts not prohibited by international law.

3. Possible future topics:

(a) International responsibility:

(i) **Diplomatic protection** (see general outline - **Addendum 1**);

(ii) International responsibility of international organizations;

(iii) Functional protection;

(b) International representation of international organizations.

X. LAW OF THE ENVIRONMENT

Possible future topics:

Law of the environment:

Rights and duties of States for the protection of the human environment [1992].

XI. LAW OF ECONOMIC RELATIONS

(i) Economic and trade relations [1971];

(ii) Legal conditions of capital investment and agreements pertaining thereto [1993];

(iii) International legal problems connected with privatization of State properties;

(iv) General legal principles applicable to assistance in development.

XII. LAW OF ARMED CONFLICTS/DISARMAMENT

Possible future topics:

(a) Legal mechanisms necessary for the registration of sales or other transfer of arms, weapons and military equipment between States [1992];

(b) General legal principles applicable to demilitarized and/or neutral zones;

(c) General legal principles applicable to armed sanctions under Chapter VII of the United Nations Charter.

XIII. SETTLEMENT OF DISPUTES

Topics already completed:

Model Rules on Arbitral Procedure, 1958.

Possible future topics:

(a) Pacific settlement of international disputes [1949];

(b) Model clauses for the settlement of disputes relating to application or interpretation of future codification conventions;

(c) Mediation and conciliation procedures through the organs of the United Nations.

Addendum 1

DIPLOMATIC PROTECTION

General Outline

1. In proposing this topic as suitable for future work by the Commission the Commission had not prepared any outline of the topic comparable to those published in A/CN.4/454 of 9 November 1993. At its forty-eighth session in 1996 the Planning Group decided that a brief outline might assist Governments in deciding whether to approve further work.

2. The outline which follows is, of course, provisional. The Special Rapporteur would be free to recommend changes, as would Governments in the Sixth Committee. However, the topic has the attraction that it would form a companion study to the Commission's work on State Responsibility. The study could follow the traditional pattern of articles and commentaries, but leave for future decision the question of its final form. The Commission does not see this particular study as necessarily leading to a Convention. It could well take the form of a guide which may be useful to Governments in handling international claims.

3. Short explanatory notes are added to some of the sections to explain why the matter has current interest.

1. The basis of, and rationale for, diplomatic protection

2. Persons claiming diplomatic protection

A. Natural persons

- (i) Nationals: proof of nationality and "genuine link";
- (ii) Dual and plural nationals: role of "effective nationality":
  - (a) As against Third States;
  - (b) As against one of the States of nationality;

Note

4. Where an individual claimant has two nationalities, it is normally accepted that the proper claimant State, as against a third State, is the State of his "effective" nationality. Nevertheless, there may be situations where the State of "effective" nationality is unable to afford protection and in which the State of his second nationality should claim. The situation is not dissimilar to the exceptional cases when the State of "genuine link" is unable to act. Even more problematic is the situation when a State of one

of the claimant's nationalities claims against the State of his other nationality. This has caused controversy within the U.S./Iran Claims Commission (see Case A.18) and that tribunal has had to consider the circumstances in which claims on behalf of dual nationals should, or should not, be permitted.

(iii) Individuals in service with the State (aliens serving in armed forces, vessels, embassies);

(iv) Stateless persons;

(v) Non-nationals forming a minority in a group of national claimants.

Note

5. Situations may arise (as with the shooting-down of an aircraft, or sinking of a vessel), when the passengers and individual claimants are largely of one nationality, but when a small minority are of a different nationality. The question then arises whether multiple claims (i.e. multiple claimant-States) must occur, or whether the single claimant State can claim in a representative capacity.

B. Juristic persons

(i) Corporations, associations, etc.;

(ii) Partnerships;

(iii) Insurers.

Note

6. The law regarding partnerships lacks clarity, especially when the partners are of different nationality and also when differences arise over whether the claim is a "partnership" claim, or an individual claim.

7. The law regarding insurers is even less developed. The destruction of, or damage to, property covered by insurance may often result in the real loss falling on the insurer. It is by no means clear that "subrogation" of claims is acceptable, so that the State of the nationality of the insurer becomes a proper claimant.

3. Protection of certain forms of State property, and individuals only incidentally

(a) Embassies;

(b) State-owned vessels, aircraft, spacecraft;

(c) Military bases.

Note

8. The Commission at this stage takes no firm position on whether protection of State property should be part of the proposed study. However, it believes that this aspect of the problem is deserving of some preliminary study. The issues are not the same as the immunities attaching to such property. They relate more to the questions of the means of protection available to the State, prior to any formal presentation of a claim.

4. The preconditions for protection

(a) Forms of protection other than claims;

(b) The presentation of an international claim:

  (i) The relevance of damage as an incidence of the claim;

  (ii) Relationship between diplomatic protection by the State of nationality and the "functional" protection extended by an international organization towards its agents;

  (iii) The rule of nationality of claims:

    - genuine link and the requirement of "continuity";
    - exceptions thereto;

  (iv) The rule of exhaustion of local remedies:

    - scope and meaning;
    - judicial, administrative and discretionary remedies;
    - obligations to exhaust appeals, reviews, etc.;

  (v) The impact of alternative international remedies:

    - rights of recourse to human rights bodies;
    - international claims commissions.

Note

9. Where rights of recourse exist for the individual, are the more traditional forms of diplomatic protection suspended, or terminated? And are the findings of such bodies conclusive in relation to future diplomatic claims?

5. The mechanisms for diplomatic protection in the absence of diplomatic relations

6. The formal requirements of a claim to protection

(a) Evidentiary requirements - of nationality, of sufficiency of claim, etc.;

(b) Timeliness - effect of delay in absence of rules on prescription.

7. The conclusiveness of claims settlements

(a) Effect on individual claimants of a Claimant State's acceptance of an offer of settlement;

(b) Settlement via international claims commissions, arbitration, etc.;

(c) Lump-sum settlements and awards by national claims commissions;

(d) Effects on settlements of subsequent discovery of:

(i) Fraud;

(ii) New facts.

Addendum 2

OWNERSHIP AND PROTECTION OF WRECKS BEYOND THE LIMITS OF NATIONAL MARITIME JURISDICTION

General Outline

1. The Working Group is of the view that this topic which was already included among those published in A/CN.4/454 of 9 November 1993 is of special interest. Indeed this topic is well delimited, has never been studied before and is of a largely practical value. Moreover, it was felt that the study of this topic could be concluded in a relatively short time, thus presenting an additional advantage.

2. The following outline is provisional. The Commission and the Special Rapporteur will be free to refine it and to recommend changes.

3. Advances in the science and technology of underwater exploration have facilitated the discovery and recovery of wrecks and their cargoes.

Competing interests surrounding this topic include:

(a) Sport and leisure (the "amateur");

(b) Economic (valuable cargo);

(c) Governmental (security, national heritage, etc.);

(d) Scientific (marine scientific research).

1. Definition of a "wreck"

Note

4. The legal definition for the purpose of the law of salvage concentrates on the notion of a vessel "in peril", and the law of salvage presumes that there is an owner and that the salvor is entitled to a reward from the owner for effective salvage.

5. But there is considerable uncertainty over whether a "wreck" is subject to salvage, as being "in peril".

6. Of relevance to this issue are some United States federal cases, the 1910 Brussels Convention on the Law of the Salvage, the 1967 Protocol to the Brussels Convention and the 1989 International Maritime Organization's International Salvage Convention. (These Conventions do not resolve the question, but leave the matter to national law.)

2. Coastal State jurisdiction

(a) Power to remove wrecks in the interests of the safety of navigation;

(b) Jurisdiction to entertain salvage claims;

(c) Jurisdiction to "protect" the wreck and regulate access to the site of the wreck;

(d) Jurisdiction to entertain claims to ownership of the wreck and/or its cargo.

Note

7. In principle, the points made in (a) and (b) and (c) are limited to international and territorial waters.

8. But in relation to archaeological objects and objects of historical origin found at sea, the 1982 United Nations Convention on the Law of the Sea, article 303 (2) provides for additional jurisdiction in the contiguous zone.

9. The areas of the continental shelf/exclusive economic zone and the high seas beyond the limits of national jurisdiction remain subject to great uncertainty in this regard, and it is clear that the 1982 Convention has not established any comprehensive regime to cover wrecks.

10. Despite the efforts of some States to extend coastal State jurisdiction to cover wrecks of archaeological or historic interest within 200 miles, the majority opposed these attempts to extend coastal State jurisdiction to resources other than "natural" resources. But there is some State practice to support such a power, and the more limited duty of protection of archaeological and historic objects (article 303 (1)) of the 1982 United Nations Convention on the Law of the Sea certainly covers these areas.

11. As concerns the high seas beyond national jurisdiction, here too, there is no general regime, but there is in article 149 of the 1982 Convention a special provision dealing with archaeological and historic objects.

3. The issue of ownership or title

(a) Naval vessels, military aircraft and other State-owned vessels, operated for non-commercial purposes;

(b) Wrecks of archaeological or historical interest.

Note

12. Are there agreed criteria for determining whether ownership has been retained or abandoned, so that the property is *res derelicta*? What law provides these criteria?

13. Wrecks may lose a flag registration, and therefore nationality under the law of some States after a certain time has elapsed, and they are "de-registered": but this does not affect ownership.

14. Does the law of State succession adequately deal with problems of a State-owned vessel, where that State has disappeared?

15. Current practice suggests that there is a presumption against abandonment of title over naval or State-owned vessels, and that an explicit act of transfer or abandonment is required. The rationale for this view lies in part in the security implications of the vessel or aircraft falling into the possession of unauthorized persons, and in part in the desire to keep the wreck untouched as a "war grave".

16. The attempts to introduce a special regime for wrecks of archaeological or historical interests in the 1982 Convention failed, but the Convention does contain certain limited provisions, such as article 149 and article 303, paragraphs 1 and 3.

17. It is difficult to extract from those a general duty of protection, utilizing the State's legislative, administrative and judicial powers, beyond the contiguous zone. So, beyond this zone, the primary issue is: who protects such wrecks? And there are consequential issues relating to ownership and disposal of the wreck and its cargo. Certain States have argued for a latent right of ownership vested in the State whose cultural heritage the vessel belongs to.

18. Furthermore, there are a number of UNESCO conventions dealing with the Cultural Heritage. But none of these deal explicitly with wrecks, and the obligations imposed on States will presumably not apply beyond the territorial sea.

19. The Council of Europe has the 1985 European Convention on Offences relating to Cultural Property (likewise not extending beyond the territorial sea); and, more in point, there is a Draft Convention on the Underwater Heritage, drawn up after the Prott Report.

20. But there is little specific legislation apart from a few exceptions: (Australia: The Historic Shipwrecks Acts of 1976; United States of America: The R.M.S. Titanic Maritime Memorial Act of 1986, and the Abandoned Shipwrecks Act of 1987). Moreover, there are a few bilateral treaties such as an Agreement between Australia and The Netherlands which concerns Old Dutch Shipwrecks: and an Agreement between Australia and Papua New Guinea on the Delimitation of Maritime Boundaries, 1978.

4. Disposal of recovered vessels or objects found therein

Note

21. Assuming access to the site is lawful, the question arises of whether the "finder" acquires title, so various questions arise:

(a) Which Courts have jurisdiction to adjudicate disputes over title? (If coastal States were given this jurisdiction out to 200 miles, most cases would be covered. Most wrecks are found within this distance offshore, since, traditionally, the trade routes have followed the coasts and wrecks have occurred where weather or error has forced a vessel too close inshore.);

(b) Should certain States have prior, or preferential, rights to either prohibit sale, or purchase the wreck or contents?

Addendum 3

UNILATERAL ACTS OF STATES

General outline

1. One of the main achievements of the Commission has been the codification of the law of treaties which has resulted in the adoption of two major conventions, the Vienna Conventions on the Law of Treaties of 1969 and on the Law of Treaties between States and international organizations or between two or more international organizations of 1986, and which is now being continued by a study on reservations to treaties, which should, in principle, result in the adoption of guidelines offered to States and international organizations.

2. However, the law of treaties is far from exhausting the much more general topic of "Sources of international law" which was envisaged as a global topic of codification in the 1949 Study of the Secretariat. This is not a subject which in itself could even be completely codified: but it appears that some more precise topics are mature and could be fruitfully studied and be the object of draft articles.

3. Among the topics which have been proposed, the Working Group is of the opinion that "Unilateral Acts of States" would be a proper subject for immediate consideration:

- It is a rather well delimited topic which has been the subject of several important doctrinal works but has never yet been studied by any international official body;
- It has been touched upon by several judgements of the ICJ, and especially in the Nuclear Tests Cases, but the celebrated dicta leave room for uncertainties and questions;
- States have abundant recourse to unilateral acts and their practice can certainly be studied with a view to drawing general legal principles;
- Although the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties certainly offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts could be approached.

4. The following general outline is tentative and will need to be refined and further discussed prior to any positive adoption for study by the Commission.

1. Definition and Typology

(a) Definition

Distinction from:

(i) Unilateral non-binding instruments;

(ii) Treaties (possibility of "plurilateral acts" ("collective unilateral acts")?);

Note

5. It is of course a matter for further study whether these comparisons should be made at the beginning or after the definition.

(iii) The substantial criterion: the will to be bound;

(iv) Great variety of forms (cf. Nuclear Tests Case); possibility of verbal unilateral acts (cf. Eastern Greenland); silence?

Note

6. The question of whether or not silence amounts to a unilateral act is a difficult one. The Commission may wish to decide at an early stage whether it intends to include it in its study.

(v) Submission to international law;

(vi) The author - attribution to the State:

- Irrelevance of the State organ's functions (executive or legislative; the judiciary?);
- Necessity of a capacity to bind the State internationally;
- Problems relating to the State's dismemberment and succession to unilateral acts.

Note

7. Very probably the law of treaties offers useful guidelines in regard to this last question; this, however, does not mean that the rules relating to capacity in the law of treaties can be simply transposed to unilateral acts.

(b) Typology

(i) "bilateral" (addressed to another determined State); "plurilateral" (addressed to the entire international community);

(ii) "autonomous" acts (notification, recognition, acquiescence, protest, renunciation, promise ...) connected with treaties (e.g., Optional declarations under Article 36 (2) of the ICJ Statute, notifications in accordance with a treaty clause).

Note

8. Here again, the very rough typology proposed must be taken with caution; it is included here more in order to offer examples and to show the complexity of the problems raised by the topic than to propose any kind of definitive classification. Moreover, it is likely that the principles in sections 2 to 4 below might not apply uniformly to all the different kinds of unilateral acts and should be differentiated.

2. Legal effects and application

(a) Binding nature of unilateral acts for the "author State"

- (i) The "Nuclear Tests" principle;
- (ii) Legal consequences:
  - . *Bona fide* application ("*Acta sunt servanda*");
  - . Creation of rights for other States ("*Acta tertiis prosunt*");
  - . Conditions to which invocation of unilateral acts by other States are submitted.

Note

9. These conditions are different from the "conditions of validity" under section 3 below; here the problem is to determine WHEN a State (and WHICH State - or other subject of international law) may invoke a unilateral act.

(b) Non-opposability to other States

- (i) The principle: a State cannot impose duties on other States ("*Acta tertiis non nocent*");
- (ii) Exceptions;
- (iii) Formal or implied acceptance by the "addressee State[s]";
- (iv) Unilateral acts adopted in application of general rules of international law.

Note

10. An example of the latter could be the unilateral delimitation of the territorial sea or the exclusive economic zone when there exists no other neighbouring coastal State.

(c) Interpretation

Note

11. Here again, see the rules in the Vienna Convention on the Law of Treaties; but, as the Court has declared, the transposition cannot be made without caution.

3. Conditions of validity

(a) Defects in the expression of will by the State

- (i) Defects in the legal capacity of the organ author of the act;
- (ii) Error;
- (iii) Defects in relation to the behaviour of the "addressee State[s]":
  - . Fraud?
  - . Corruption;
  - . Duress on the State author of the act;
- (iv) Acts contradicting a peremptory norm of general international law (*jus cogens*).

Note

12. The Law of Treaties offers an indispensable point of departure but can probably not be transposed purely and simply.

(b) Legal consequences of defects in the expression of will

- (i) Procedure in case of defects in the expression of will by the State;
- (ii) Nullity of the act and its consequences (variety of consequences depending on the type of the defect and, probably, on the type of the act itself).

4. Duration, Amendment and Termination

Note

13. This is certainly the most important problem in practice and the real core of the whole study lies here: nobody can seriously doubt that a State is bound by its unilateral acts (see the ICJ's judgements in the *Nuclear Tests*

cases; but it would be absurd to pose as a principle that a State can never retract from its expression of will. However, the international jurisprudence seems to be of very little help in this regard and the Commission will probably have to undertake progressive development.

(a) *Termination or amendment by the "author State"*

  (i) Express or implied limited duration;

  (ii) General limitation on the right of the State author of the act to terminate or amend its act;

(b) *Termination or amendment because of external circumstances*

  (i) Fundamental change of circumstances;

  (ii) Impossibility of application;

  (iii) Armed conflict?

  (iv) Succession of States?
